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In The

Supreme Court of the United States

In re

LOCAL # 46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,

Petitioners,

– against –

UNITED STATES OF AMERICA; CHARLES DOHERTY; HON. JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK; HON. DENNIS JACOBS, CHESTER STRAUB, PETER HALL AND REMAINING JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. The Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (the "Act" or "CVRA"), guarantees federal crime victims an array of substantive and participatory rights, including the right to full and timely restitution as provided in law. Violations of the Act are enforceable by mandamus petition to the appropriate circuit court, which must clearly state the reasons for any denial in a written opinion. The Act is silent, however, as to the availability of further recourse in this Court for aggrieved victims. Given the Act's twin goals of vindicating victims' rights and expanding their role in federal criminal proceedings, does this Court have jurisdiction – by way of certiorari, extraordinary writ, Article III of the Constitution or any other source – to review circuit court denials of mandamus petitions under the CVRA?

2. In *Hughey v. United States*, 495 U.S. 411 (1990), this Court held that restitution under the Victim and Witness Protection Act, 18 U.S.C. § 3663 ("VWPA"), is limited to losses caused by the conduct comprising the offense of conviction. Courts have extended this holding to the subsequently passed Mandatory Victims' Restitution Act of 1996, 18 U.S.C. § 3663A ("MVRA"). After *Hughey*, Congress broadened the scope of the term "victim" as it appears in both the VWPA and MVRA, defining it identically to mean: "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that

involves as an element a ... conspiracy ..., any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...." Given the congressional trend toward enforcing victim rights and expanding restitution's availability, should this Court grant certiorari to resolve a conflict among the circuits over the following substantial question: did the quoted language extend restitution to losses caused by acts of related conduct for which the defendant was not convicted – not just the conduct comprising the offense of conviction – in conspiracy cases, abrogating *Hughey* to that extent?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI (AND/OR EXTRAORDINARY WRIT) TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, a local labor union and its associated benefit and other funds (collectively, the "Union"), respectfully seek review of the Second Circuit's denial of their mandamus petition under 18 U.S.C. § 3771(d)(3) – part of the CVRA – arising from the sentencing of a convicted defendant in a criminal case. *See United States v. Charles Doherty*, 05-CR-494 (E.D.N.Y.). In denying relief, the Second Circuit opined that the Union was not a "victim" of Doherty's money laundering conspiracy offense (18 U.S.C. § 1956(h)) within the meaning of 18 U.S.C. § 3663A(a)(2) – part of the MVRA – and therefore not entitled to an order of restitution.

Opinions Below

The Second Circuit's opinion, *In re Local # 46 Metallic Lathers Union and Reinforcing Iron Workers, et al.*, 568 F.3d 81 (2d Cir. June 9, 2009), is reproduced at 1a *et seq.* The district court's opinion, *United States v. Doherty*, 2009 WL 1310877 (E.D.N.Y. May 7, 2009), is reproduced at 27a *et seq.*

Supreme Court Jurisdiction

This Court has putative jurisdiction under 28 U.S.C. § 1254(1), the All Writs Act (28 U.S.C. § 1651) and/or U.S. CONST. art. III. On August 26, 2009, Justice Ginsburg extended the deadline for this petition through November 6, 2009. The petition timely follows.

Statutory Provisions

The CVRA and MVRA, codified at 18 U.S.C. §§ 3771 and 3663A, respectively, are fully reproduced in the appendix. Their salient provisions follow.

1. 18 U.S.C. § 3771(a)(6)

> **Rights of crime victims.** – A crime victim has the following rights: ... The right to full and timely restitution as provided in law.

2. 18 U.S.C. § 3771(d)(3)

> **Enforcement and limitations.** —... **Motion for relief and writ of mandamus.** – The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted.... If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus.... The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed.... If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

3. 18 U.S.C. § 3663A(a)(1)-(2)

> **Mandatory restitution to victims of certain crimes[.]** Notwithstanding any other provision of law, when sentencing a defendant convicted of a[covered] offense ... the court shall order ... that the defendant make restitution to the victim of the offense....
>
> For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

District Court Jurisdiction

The district court had jurisdiction under 18 U.S.C. §§ 1956, 3231, 3551 *et seq.*, 3663A and 3771.

Statement of the Case

1. Doherty pleaded guilty to a single money laundering conspiracy violation under 18 U.S.C. § 1956(h). 568 F.3d at 82.

2. At sentencing, the Union moved under the CVRA, 18 U.S.C. § 3771(a)(4) and (6), to participate as a victim with a view to recovering restitution from Doherty.

3. After extended proceedings in which the Union participated, the district court denied its restitution request. 568 F.3d at 83-84.

4. Challenging the denial, the Union sought mandamus in the Second Circuit under CVRA § 3771(d)(3).

5. The Second Circuit affirmed, opining that the Union was not a "victim" as defined in MVRA § 3663A(a)(2), and therefore not entitled to restitution.

6. In so ruling, the Court interpreted subsection (a)(2)'s operative phrase "in the case of an

offense that involves as an element a ... conspiracy ..., [a victim is] any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...."

7. Notably, the Second Circuit recognized that this language "expands" what will "give rise to a compensable loss when a ... conspiracy ... is involved." 568 F.3d at 87. Nonetheless, the Court read the provision narrowly, construing it to refer solely to conspiratorial conduct constituting an element of the offense of conviction – as opposed to the defendant's broader "criminal conduct in the course of the ... conspiracy." 18 U.S.C. § 3663A(a)(2).

8. Finding that the Union was not directly harmed by the charged money laundering conspiracy to which Doherty pled, the Court thus concluded that the Union did not qualify as a "victim" for MVRA purposes and upheld the denial of restitution.

9. In reaching this result, the Second Circuit acknowledged that its reading of subsection (a)(2) created a potential conflict with at least that of the Ninth. 568 F.3d at 87 n.3. That court, by contrast, permits restitution for "harm[s] in the course of the defendant's scheme *even beyond the counts of conviction*" – that is, for harms from "related conduct" not specifically

charged in a conspiracy indictment. *United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007) (emphasis in original) (citation and internal quotes omitted).

10. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD HEAR THIS CASE TO DETERMINE ITS OWN JURISDICTION TO REVIEW CVRA MANDAMUS DENIALS IN THE COURTS OF APPEALS

Sprung from a 10-year push for a constitutional amendment "explicitly recogniz[ing] victims' rights," *United States v. Turner*, 367 F. Supp. 2d 319, 337 (E.D.N.Y. 2005), the CVRA is a "relatively new statute that effects dramatic changes to our criminal justice system." *In re Antrobus*, 563 F.3d 1092, 1101 (10th Cir. 2009). The Act immensely empowers federal crime victims, making them "independent participants in the ... justice process," *Kenna v. U.S. Dist. Ct., Cent. Dist. of Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006), with their own "seat at the table." *Antrobus*, 563 F.3d at 1101.

Yet, while the parcel of rights the CVRA confers are expressly enforceable by mandamus petition in the "court of appeals," 18 U.S.C. § 3771(d)(3), the Act is conspicuously silent about further review in this Court.

Even so, nothing in the statute purports to strip the Court of certiorari jurisdiction, *cf.* 28 U.S.C. § 2244(b)(3)(E),[1] which ordinarily lies for "a 'party' to a case in the Court of Appeals." *Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965) (quoting 28 U.S.C. § 1254(1)). And as this Court has long held, a "case" in this context extends to any "'proceeding in court.'" *Hohn v. United States*, 524 U.S. 236, 241 (1998) (quoting *Blyew v. United States*, 13 Wall. 581, 595 (1871)).

Since the Union's mandamus petition was a "case" in the Court of Appeals and the Union a named "party" there, this Court's jurisdiction would thus seem unassailable. *Cf. Antrobus*, 563 F.3d at 1097 (assuming certiorari jurisdiction to review CVRA mandamus denials in circuit courts); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (exercising certiorari jurisdiction to review mandamus grant). That conclusion is reinforced by the Court's flexible conception of the term "party,"[2] and the "apparent legislative intent" to afford victims "direct standing" to

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[1] "The grant or denial of an authorization by a court of appeals to file a second or successive [habeas] application ... shall not be the subject of a petition ... for a writ of certiorari."

[2] *See Devlin v. Scardelletti*, 536 U.S. 1, 7-8, 10 (2002) (noting that Court has never "restricted" appeal right to "named parties to the litigation," and instructing that the "label 'party' does not indicate an absolute characteristic," only a contextual "conclusion about the applicability of various procedural rules").

"vindicate their rights independent of prosecutors," *Turner*, 367 F. Supp. 2d at 324, 336, with broad appellate recourse. *Cf. In re Siler*, 571 F.3d 604, 605 (6th Cir. 2009) (though victims "did not formally intervene and become parties," district court so treated them and decided merits of their motions, thus conferring appellate standing) (citing *Karcher v. May*, 484 U.S. 72, 77 (1987)).

As the CVRA's cosponsor aptly explained: "Appellate review of denials of victims' rights is just as important as the initial assertion of a victim's right. This [statute] ensures review and encourages courts to *broadly defend* the victims' rights." 150 CONG. REC. S4270 (2004) (statement of Sen. Feinstein) (emphasis supplied). In short, if this Court has certiorari jurisdiction to review a mere denial of leave to appeal where the applicable habeas statute did not expressly provide for it, *see Hohn*, then the Court certainly has jurisdiction to review the denial of a fully litigated mandamus petition by lengthy published opinion.

Any doubt on this score is dispelled by several additional considerations:

A. The statute's text requires the court of appeals to "clearly state[]" its reasons for any mandamus denial "on the record in a written opinion," 18 U.S.C. § 3771(d)(3), which typically contemplates and facilitates further appellate review.

B. The statute's complexities raise many unanswered questions, *see Turner*, 367 F. Supp. 2d 319, and the "participants in [our] system – prosecutors, defendants, victims, and courts alike – are rightfully struggling with its scope and meaning." *Antrobus*, 563 F.3d at 1101. With no recourse in this Court, these questions would elude definitive settlement, fostering uncertainty, undermining uniformity, spawning inefficient piecemeal litigation, and freezing the law in disarray. These concerns are compounded by the statute's 72-hour window for deciding mandamus petitions, 18 U.S.C. § 3771(d)(3), leaving the circuit courts little time for reasoned analysis or coherent development of the law. *See* U.S. Govt. Accountability Office, Crime Victims' Rights Act: Increasing Awareness, Modifying the Complaint Process, and Enhancing Compliance Monitoring Will Improve Implementation of the Act, at 50 (Dec. 2008) (judges and others say 72-hour window "may not provide enough time to decide on complex issues, produce well-thought-out opinions, and allow parties to respond to the petition").

C. Absent a government appeal in the underlying prosecution, *see* 18 U.S.C. § 3771(d)(4), victims aggrieved by circuit court mandamus denials would have no "means" of vindicating their CVRA rights without review in this Court, *Devlin*, 536 U.S. at 11 – anathema to the statutory goals of victim empowerment, independent standing, "liberal[]" application, and ensuring victim primacy in "criminal cases." *Turner*, 367 F. Supp. 2d at 335-36.

Since this Court alone has jurisdiction to determine its own jurisdiction, *United States v. Ruiz*, 536 U.S. 622, 628 (2002), this issue will endlessly recur yet forever evade review unless the Court confronts it sometime. This case presents a perfect opportunity to do so.

II. THE COURT SHOULD HEAR THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER RESTITUTION IN CONSPIRACY CASES IS LIMITED TO HARM CAUSED BY THE OFFENSE OF CONVICTION, OR EXTENDS MORE BROADLY TO RELATED UNCHARGED CONDUCT BY THE DEFENDANT

A. *HUGHEY* AND ITS AFTERMATH

In its 1990 *Hughey* opinion, this Court construed 18 U.S.C. § 3663 (formerly § 3579) of the original VWPA, providing that "'a defendant convicted of an offense' may be ordered to 'make restitution to any victim of such offense.'" 495 U.S. at 412-13 & n.1, 415-16. Relying on the VWPA's plain "language and structure," the Court concluded that this provision strictly limited restitution awards to losses caused by the "specific conduct" underlying the "offense of conviction." *Id.* at 413, 416, 419-20, 422.

By subsequent amendments, Congress added a subsection (a)(2) to § 3663, broadly redefining "victim" to mean "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a ... conspiracy ..., any person directly harmed by the defendant's criminal conduct in the course of the ... conspiracy...." Concomitantly, Congress also enacted an "identical" victim definition as MVRA § 3663A(a)(2), the provision at issue here. *In re Local # 46*, 568 F.3d at 86.

B. THE POST-AMENDMENT CIRCUIT SPLIT IN CONSPIRACY CASES

These amendments have proven vexing, splintering the lower courts as to their meaning and proper application in conspiracy prosecutions. Among the disputes are whether the amendments serve to nullify *Hughey*'s offense of conviction limitation, and whether they extend restitution to uncharged acts by the defendant that relate to, but are not actually part of, the conspiracy as charged.

1. The Closely Related Uncharged Conduct Approach

At least five circuits answer these questions in the affirmative. Representative is *United States v. Holthaus*, which observed that the amendments "supersede[] *Hughey*" and authorize restitution for

"every victim harmed in the course of the defendant's ... conspiracy ..., not just the offense of conviction." 486 F.3d 451, 458 n.6 (8th Cir.), *cert. denied*, 128 S. Ct. 343 (2007) (citation and internal quotes omitted); *accord United States v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) ("expansive[]" amendments "discard" *Hughey* in conspiracy context, allowing restitution regardless of whether the defendant's "*particular criminal conduct* ... which directly harmed the victim was alleged in a count to which the defendant pled guilty, or was even charged in the indictment") (collecting cases) (emphasis in original).

In what one court calls the "majority view," the amendments thus "partially overruled *Hughey*'s restrictive interpretation" and broadened restitutionary authority to conduct "closely related" to the charged conspiracy – whether or not "the defendant is convicted for each criminal act within" its scope. *United States v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996) (citations and internal quotes omitted); *accord United States v. Dickerson*, 370 F.3d 1330, 1334-36 & n.8, 1338-43 (11th Cir. 2004) (amendments "all but eviscerated *Hughey* with respect to crimes involving [conspiracies]" and require restitution "for all losses resulting from a common [plan]"); *Brock-Davis*, 504 F.3d at 998-1000 (amendments partly overruled *Hughey*, expanding restitution in conspiracy cases to "*acts of related conduct for which the defendant was not convicted*") (citation omitted) (emphasis in *Brock-Davis*).

2. The Strict Elements of the Offense of Conviction Approach

Conversely, a bloc of five other circuits takes a starkly different tack. Courts in this camp recognize that Congress responded to *Hughey* by "expand[ing] the definition of 'victim.'" *United States v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009). Curiously, though, they insist that the decision continues to "'exclude injuries caused by offenses that are not part of the conspiracy of which the defendant has been convicted.'" *Id.* (quoting *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005)) (alterations omitted).

As the Second Circuit put it in the opinion below: "While the [amendments] expand[] what ... will give rise to a compensable loss when a ... conspiracy ... is involved, the reference point ... remains the 'offense' of which the defendant has been convicted.... [The 'conspiracy'] must be an 'element' of that 'offense' in order for the conduct in the course of the ... conspiracy to be considered ... a basis" for restitution. *In re Local # 46*, 568 F.3d at 87 (quoting 18 U.S.C. § 3663A(a)(1)-(a)(2)); *accord United States v. Akande*, 200 F.3d 136, 141 (3d Cir. 1999) (claiming that amendments merely "enlarged the group of [eligible] victims" while leaving the "triggering event" and "boundaries of [] restitution[]" the same: "the offense of conviction"); *United States v. Hughey*, 147 F.3d 423, 437-38 (5th Cir. 1998) ("*Hughey II*") (despite amendments, "[t]hat part of *Hughey* which restricted the award of restitution to

the limits of the offense ... still stands"; district court lacks authority to award restitution in excess of harm directly resulting from conduct supporting conviction).

C. CERTIORARI IS IMPERATIVE GIVEN THE UNPRECEDENTED EMPOWERMENT OF VICTIMS IN FEDERAL PROSECUTIONS

As this brief survey illustrates, the Union's petition presents a square and mature circuit conflict on a pure question of law: Do amended VWPA § 3663(a)(2) and MVRA § 3663A(a)(2) overrule *Hughey* in conspiracy cases by authorizing restitution for related conduct by the defendant beyond the elements of the offense of conviction? Or does *Hughey* survive those provisions and continue to limit restitution to the specific conduct encompassed by the conspiracy as charged?

With the growing emphasis on the rights of victims, and their increasing ubiquity and influence in federal criminal proceedings via the CVRA and MVRA, the Court should grant certiorari to resolve this conflict. And in resolving it, the Court should adopt the broader, victim-friendlier position of the first group of circuits, rejecting the narrow, elements-of-the-offense-based approach advocated by the second. This is so for several preliminary reasons, to be augmented and amplified in a merits brief.

D. THIS COURT SHOULD ENDORSE THE CLOSELY RELATED UNCHARGED CONDUCT APPROACH

First, an element-based, offense-of-conviction standard contravenes the MVRA's (and VWPA's) plain text. Had Congress intended to maintain *Hughey*'s strictures in conspiracy cases, it would have tracked *Hughey*'s terminology in §§ 3663(a)(2) and 3663A(a)(2), writing "in the case of an offense that involves as an element a ... conspiracy," a "victim" includes "any person directly harmed by the defendant's criminal conduct" *underlying* or *forming the basis* of that element. *See Hughey*, 495 U.S. at 413 (limiting restitution to "specific conduct that is the basis of the offense of conviction"); *id.* at 416 (limiting restitution to "conduct underlying the offense of conviction"); *id.* at 420 ("conduct underlying the offense of conviction establishes the outer limits of a restitution order").

Instead, Congress consciously chose the phrase "any person directly harmed by the defendant's criminal conduct *in the course* of the ... conspiracy," meaning conduct in a conspiracy's "usual or natural order," Webster's Third New International Dictionary 522 (2002) – a broader concept connoting all criminal activity generally accompanying the conspiracy. The Second Circuit's contrary contention – the MVRA "expands" what will "give rise to a compensable loss" in conspiracy cases, but the reference point remains the elements of the "'offense'" of conviction, *In re Local #*

46, 568 F.3d at 87 – reads the "in the course of" language out of the statute. It thereby reduces the statute to redundancy and "revives the *Hughey* holding [since] discarded by Congress." *Hensley*, 91 F.3d at 277. Yet the *Hughey* Court had "no opportunity" to consider this new "definition of 'victim'" because it simply did not exist at the time. *Dickerson*, 370 F.3d at 1338 (*Hughey* decided before Congress amended VWPA and enacted MVRA).

Second, legislative history confirms that Congress intended the "in the course of" language to lift *Hughey* 's restrictions and extend restitution beyond the confines of the conspiracy as charged. As Sen. Nickles pointedly explained in his floor statement supporting a precursor to amended VWPA § 3663(a)(2) and MVRA § 3663A(a)(2):

> Section 902 ... *overturns the Supreme Court's ruling in the* Hughey *case* which stated restitution could not be ordered for crimes beyond the scope of the offense of conviction. So, if a criminal is convicted of a criminal offense, but plea bargains his way out of a conviction on a second offense, he cannot be held responsible

> to repay the victim of the second offense. This obvious shortcoming is corrected by allowing the court to *consider the course of criminal conduct and order restitution for crimes other than the offense of conviction.*

139 CONG. REC. S15990 (1993) (emphasis supplied).

By adding the "in the course of" phrase, then, Congress accepted *Hughey*'s invitation to use language other than the unadorned "'offense'" if it contemplated recovery for a wider range of conduct "[]related to the offense of conviction." 495 U.S. at 418; *cf. Turner*, 367 F. Supp. 2d at 326-27 & n.7 (CVRA's "similar" definition of "victim" is "intentionally broad" because all crime victims "deserve to have their rights protected, *whether or not they are the victim of the count charged*") (quoting legislative history) (emphasis in *Turner*).

Third, awarding restitution for related conduct beyond the conspiracy as charged promotes the policy of expanding and aggressively enforcing victims' rights. The MVRA's purpose, after all, is to "*requir[e]* Federal criminal defendants to pay *full* restitution to the identifiable victims of their crime," ensuring that victim losses are "recognized," that they receive the

"restitution they are due," and that the offender "realizes the damage caused by the offense" and pays his debt to the victim and society. S. Rep. No. 104-179, at 15 (1995) (emphasis supplied), *reprinted in* 1996 U.S.C.C.A.N. 924, 925. Similarly, the CVRA – born of a "decade-long drive to amend the Constitution to explicitly recognize victims' rights," *Turner*, 367 F. Supp. 2d at 337 – aims to "amplif[y]" and "codify" those rights, providing a robust "enforcement mechanism." H.R. Rep. No. 108-711, at 4 (2004), *reprinted in* 2005 U.S.C.C.A.N. 2274, 2277. A strict elements-of-the-offense approach thwarts these goals and defies the congressional commands of liberal application, *Turner*, 367 F. Supp. 2d at 335, and broad construction, 150 CONG. REC. S4270 (2004) (statements of Sen. Kyl and Sen. Feinstein)

Fourth, the MVRA's and VWPA's dual constraints of proximate causation (*cf.* 18 U.S.C. § 1964(c))[3] and direct harm from the defendant's own conduct – not that of coconspirators – answer *Hughey*'s pre-amendment concern that going beyond the offense of conviction would prompt "an open-ended inquiry into losses resulting from the defendant's related course of conduct." 495 U.S. at 419 n.4; *cf. In re Local # 46*, 568 F.3d at 87 (worrying that expanding victim definition – exactly what Congress has done – would "force"

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[3] *See, e.g., In re Rendon Galvis*, 564 F.3d 170, 175-76 (2d Cir. 2009) (denying restitution for insufficient "causal connection" between crime and injury).

courts to "ascertain some overarching uncharged" conspiracy, "one element of which is the specific offense" of conviction); *Akande*, 200 F.3d at 140-41 (fearing awards based on "vague allegations" of "broad, unsubstantiated conduct") (citations and internal quotes omitted). In any event, courts routinely make similar determinations in assessing relevant conduct under the Sentencing Guidelines, and considering a defendant's uncharged acts relating to the charged conspiracy roughly aligns restitution and sentencing law – albeit less than fully so with respect to restitution. *Cf. Dickerson*, 370 F.3d at 1334 n.8, 1342-43 ("[i]f a district court may consider relevant conduct ... in determining the offense level ..., we fail to see what precludes it from considering such conduct in fashioning a restitution order"); *contra Akande*, 200 F.3d at 143; *United States v. Scott*, 250 F.3d 550, 553 (7th Cir. 2001).

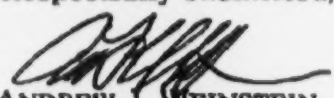
Fifth, allowing recovery for related conduct in conspiracy cases reduces "undercompensation" by prosecutorial charging discretion, as indictments are often framed "with a view to success at trial rather than ... a victim's interest in full compensation." *Hughey*, 495 U.S. at 421 (citation omitted). By amending the VWPA and passing the MVRA to enlarge the class of eligible victims in the conspiracy context, Congress signaled its belief that *Hughey* had undervalued this factor. An element-oriented, offense-of-conviction approach – essentially preserving *Hughey*'s limitations in conspiracy prosecutions –

would judicially repeal the change, returning the law to its pre-amendment state and infringing the separation of powers.

CONCLUSION

The Court should grant this petition and vacate the judgment below, as the Union was "admittedly" harmed by a common "plan" involving the charged money laundering conspiracy – if not the conspiracy itself. *In re Local # 46*, 568 F.3d at 86.

Respectfully submitted,



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**Counsel of Record*

Appendix A – Order From the USCA for the Second Circuit, Decided June 9, 2009 [Pages 1a – 25a]

09-2113-op
In re: Local # 46 Metallic Lathers Union

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2008

(Submitted: May 20, 2009 Decided: June 9, 2009)

Docket No. 09-2113-op

In re: Local #46 Metallic Lathers Union and Reinforcing Iron Workers and Its Associated Benefit and Other Funds,

Petitioner,

United States of America,

Appellee,

Charles Doherty,

Defendant-Appellee,

v.

Metal Lathers Local 46 Pension Fund,

Movant-Appellant.

Before JACOBS, *Chief Judge*,
STRAUB and HALL, *Circuit Judges*.

The petitioner seeks relief by way of a petition for mandamus brought under the provisions of the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771, and the

Appendix A

Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A-64, seeking recognition as a crime victim and restitution for payments required under certain collective bargaining agreements. Because the offense of conspiring to engage in money laundering to which the defendant pleaded guilty did not include activity in the course of that scheme or conspiracy that caused the petitioner's loss, the offense conduct was not shown to have been a direct harm to the petitioner; thus, we hold that the petitioner is not a crime victim under the Act and is not entitled to restitution. The district court did not err in so finding nor abuse its discretion in denying petitioner's motion. The petition for mandamus is, therefore, DENIED.

Andrew J. Weinstein, Weinstein & Mazurek PLLC, New York, NY, *for Petitioner.*

Peter A. Norling, Chief, Appeals Division, and Burton T. Ryan, Assistant United States Attorney *on the brief*, for Benton J. Campbell, United States Attorney for the Eastern District of New York, Brooklyn, NY, *for Appellee.*

James O. Druker, Kase & Druker, Garden City, NY, *for Defendant-Appellee Charles Doherty.*

Appendix A

PER CURIAM:

Before us is a petition for a writ of mandamus brought by Local #46 Metallic Lathers Union and Reinforcing Iron Workers and its associated benefit and other funds ("Local 46") pursuant to 18 U.S.C. § 3771(d)(3) to have this Court reassess entitlement to certain rights afforded by the Crime Victims' Rights Act of 2004 ("CVRA"), 18 U.S.C. § 3771, and the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. §§ 3663A-64, and to order the district court to award restitution pursuant to § 3771(a)(6). The petition was filed on May 19, 2009. The Court took the case on submission on May 20, 2009, and on May 22, 2009, within three days of the filing, we issued an order denying the petition, noting that this opinion would follow. In essence, Local 46 appeals from the May 7, 2009, ruling of the United States District Court for the Eastern District of New York (Seybert, J.) that denied Local 46 status as a crime victim in the case United States v. Doherty, No.

05-cr-494. Because the district court did not abuse its discretion in finding that Local 46 was not a "crime victim" as defined by the CVRA and the MVRA, we deny the petition.

Background

In 2005, Charles Doherty pleaded guilty to an information charging him with one count of conspiracy to launder money in violation of 18 U.S.C. §§ 1956(h) and 3551, et seq., based on his actions as president of U.S. Rebar. The information charged that the conspiracy entailed three unlawful activities—uttering forged checks, theft concerning programs receiving federal funds, and mail fraud. As to uttering forged checks, Doherty admitted during his plea colloquy that he forged checks from U.S. Rebar payable to fictitious vendors, and provided those checks to Joseph Castello, a check casher who cashed the checks and transferred the cash, minus a fee, to Doherty, who then used the cash to pay union employees off the books. At the plea proceedings, the

Government clarified further that Doherty orchestrated the cashing of checks that constituted payments owed to U.S. Rebar, some of which were payments for government contracts. The endorsements of the checks that were cashed were either forged or falsely completed, which resulted in creation of false banking records and thus were a basis for mail fraud.[1] Doherty admitted that the monies he received were "for purposes of paying certain employees in cash, thereby allowing them to avoid reporting a portion of their income to the IRS," and the employees were paid "the full amount that they would have gotten in cash."

Based on Doherty's plea, Local 46 moved for restitution pursuant to the MVRA and the CVRA, contending that the collective bargaining agreements between itself and U.S. Rebar required U.S. Rebar to

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[1] The theft concerning programs receiving federal funds, although not addressed in any detail in the plea colloquy, arose from Doherty's use of minority-owned contracting companies as fronts to obtain public contracts, and his diversion of the payments on those contracts.

make payments to union funds and that by paying employees in cash, U.S. Rebar had evaded that requirement.

At sentencing a debate ensued between the Government and Doherty regarding the dollar amount cognizable as laundered proceeds. Significantly, in view of Local 46's claim, the Government argued: "[t]he fact that [Doherty] used [the proceeds] as expenses for running his construction company is not a part and parcel of the crimes . . . committed, and were not expenses related to those crimes," and that Doherty's use of most of the laundered money to pay business expenses was a separate scheme, and therefore, irrelevant. Doherty's counsel, seeking to limit Doherty's exposure under the Sentencing Guidelines, see U.S.S.G. § 2S1.1, countered that the gains attributable to Doherty's crime should exclude the amount paid as business expenses. Counsel argued that Doherty should not be held responsible for the total amount of the

laundered checks because the money from the check cashing went to pay employees, and paying employees in cash was the "whole raison d'etre" of the scheme.

The parties and the court later agreed that all of the proceeds of the fraudulent check cashing scheme constituted proceeds under the money laundering statute, 18 U.S.C. § 1956(a), but, apparently by way of compromise, they agreed that the payments to employees under the federal contract scheme would not be counted as proceeds under § 1956. Local 46 was given an opportunity to allocute extensively concerning the impact of Doherty's behavior on the union. When the district court asked about restitution, the Government cited the difficulty of calculating restitution generally, but did not argue against restitution of Local 46 on the ground that it was not a victim. Doherty's counsel explained to the district court that both the Government and Doherty had tried to ascertain the amount of restitution, but

could not do so with reasonable certainty. Given the complexities of determining any loss to Local 46, the district court sentenced Doherty to a term of imprisonment and a fine, but referred the issue of restitution to a magistrate judge.

Before the magistrate judge, Doherty argued for the first time in response to the restitution request that Local 46 was not a victim under the MVRA because restitution was required only for conduct of which a defendant had been convicted. In support of his argument, Doherty pointed out that in his cooperation agreement with the Government, he agreed to plead guilty to one count of money laundering conspiracy, and in exchange, the Government agreed not to bring any additional criminal charges for Doherty's "activity involving his fraud in connection with . . . defrauding union benefit funds." Thus, adding a new argument to those he advanced at his sentencing proceeding, Doherty contended that the conspiracy of which he was

convicted did not include his ultimate plan to use the laundered cash to pay employees, nor did it include as an element any conduct that had a direct impact on Local 46.

Local 46 replied that Doherty had conceded its victim status by failing previously to object or challenge restitution on that ground. Local 46 also argued that although the specified unlawful acts of the conspiracy were the forged checks, the federal contract fraud, and the mail fraud, the acts of money laundering were completed by the financial transactions using the proceeds of those activities, i.e., cash payments to employees.

The magistrate judge recommended that Local 46's motion be denied, agreeing with Doherty that his receipt of the cash from Castello constituted the relevant financial transactions and completed the acts of money laundering. The magistrate judge went on to state that the common goal of the conspirators was to turn the forged checks into cash and that the

use of the cash to pay the workers was not part of the scheme. Quoting *United States v. Donaghy*, 570 F. Supp. 2d 411, 426 (E.D.N.Y. 2008), the report and recommendation concluded that the MVRA allows for recovery only for conduct that is "'part of the applicable scheme, conspiracy, or pattern of conduct that is the offense of conviction,'" and that Local 46 has not suffered direct and proximate harm from the offense of conviction as required for an award under the MVRA. Local 46 objected to the magistrate judge's findings, arguing that the analysis conflated the unlawful activity element, forging a check, with the financial transaction and contending that the magistrate judge had ignored evidence in the record establishing that cash payments to employees was the goal of the conspiracy between Doherty and Castello. Doherty testified (at Castello's trial) that he gave Castello checks to get cash to pay Doherty's employees, and said at his plea hearing that he had cashed fraudulent checks "for purposes of paying

certain employees in cash."

The district court adopted the magistrate judge's report and recommendation in its entirety, finding that Local 46 had not been directly and proximately harmed by Doherty's money laundering because the offense was complete at the moment Castello handed the cash to Doherty. The court agreed that restitution was not available under the MVRA for harm caused by the actions of a single conspirator acting outside the conspiracy as part of a broader uncharged scheme. Local 46 filed a petition for mandamus in this Court to challenge that adverse determination under the provisions of the CVRA. *See* 18 U.S.C. § 3771(d)(3).

In its petition for mandamus Local 46 concedes that the definitions of "victim" under both the CVRA and MVRA are coterminous, and it agrees "with the District Court's determination that 'a person may be entitled to restitution only if he or she was directly and proximately harmed as a result of [defendant]

Doherty's conspiracy to launder money.'" Local 46 argues that it is a victim of Doherty's specific offense of conviction, i.e., the money laundering conspiracy to which Doherty pleaded guilty. It "faults the District Court's application of the facts of [the] case to the legal standard defining a victim according to the elements of the crime or offense of conviction," and reiterates arguments made below that Doherty's cash payments to his employees were the financial transactions that completed the money laundering conspiracy. For support of this argument Local 46 points to the district court's agreement, at sentencing, with respect to the federal contract theft activity that only the cash payments that exceeded the amount of cash paid to employees would be counted for sentencing purposes; thus the cash payments to employees were a part of the federal contract laundering activity even if not a part of the check forging activity. In addition, Local 46 argues that Doherty's testimony at Castello's trial regarding

the purpose for which the laundered funds were used contradicts the court's conclusion that there was no basis for finding that the cash payments were part of the conspiracy.

Discussion

Local 46 argues that the money laundering conspiracy to which Doherty pleaded guilty included Doherty's cash payments to union workers. The dispositive issue is therefore whether the conspiracy to launder money for which Doherty was convicted was complete when Castello transferred the cash to Doherty or whether it included making cash payments to employees with the monies received in the laundering process. It is those cash payments, Local 46 alleges, that deprived it of benefits due under collective bargaining agreements. For the reasons that follow, we hold that the district court did not abuse its discretion in determining that the conspiracy charge to which Doherty pleaded guilty did not encompass the activity of which Local 46 was

a victim.

"The CVRA guarantees to the victims of federal crimes an array of substantive and participatory rights, including the right[] . . . to receive 'full and timely restitution as provided in law.'" *In re Rendon Galvis*, 564 F.3d 170, 174 (2d Cir. 2009) (*per curiam*) (quoting 18 U.S.C. § 3771(a)(6)). "In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded th[ose] rights." 18 U.S.C. § 3771(b)(1). "The district court must decide a putative victim's motion asserting rights under the CVRA, and, following denial of the motion, 'the movant may petition the court of appeals for a writ of mandamus.'" *Rendon Galvis*, 564 F.3d at 174 (quoting 18 U.S.C. § 3771(d)(3)).

We review a district court's determination under the CVRA for abuse of discretion. *See In re W.R. Huff Asset Mgmt. Co.*, 409 F.3d 555, 563 (2d Cir. 2005). The MVRA defines a victim as "a person

directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2).[2]

As Local 46 has conceded, the district court's statutory authority to award restitution under the MVRA is limited to awards to victims of the offense of conviction. *See Hughey v. United States,* 495 U.S. 411, 416-19 (1990) (addressing prior version of the Victim and Witness Protection Act ("VWPA"), 18 U.S.C. § 3579, which provided that at sentencing, a district

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[2] This Court has not yet determined whether the CVRA's definition of crime victim as "a person directly and proximately harmed as a result of the commission of a Federal offense" is the same as the MVRA definition. We need not decide that issue in this case, however, because petitioner has argued this case under the provision of the MVRA concerning offenses that involve a conspiracy, such as the one here, and does not press us to look beyond that provision for purposes of defining the statutory term "victim."

court was authorized to award restitution to "any victim of such offense"). Although *Hughey* involved the pre-amendment version of the VWPA, courts have extended its analysis to the amended version of that statute. See, e.g., *United States v. Hughey*, 147 F.3d 423, 437 (5th Cir. 1998) ("That part of *Hughey* which restricted the award of restitution to the limits of the offense, however, still stands."). We have approved of this analysis and, because the amended version of the VWPA contains identical language to the MVRA, we have further extended *Hughey* to the MVRA. *United States v. Oladimeji*, 463 F.3d 152, 158-59 (2d Cir. 2006) (holding that the relevant question in imposing restitution under the MVRA is whether the "loss [is] caused by the specific conduct that is the basis of the offense of conviction"); see also *United States v. Akande*, 200 F.3d 136, 141 (3d Cir. 1999) (holding that "[t]he conduct underlying the offense of conviction thus stakes out the boundaries of the restitutionary authority" under the MVRA).

Appendix A

Local 46 asserts that the district court abused its discretion in finding that Local 46 is not a victim of the money laundering offense to which Doherty pleaded guilty and, therefore, not entitled to restitution under the MVRA. Local 46's argument is essentially fact-based, urging that the circumstances support a determination that Local 46 was a victim of Doherty's scheme to get cash to pay union workers thus avoiding an obligation to pay monies owed to Local 46 under certain collective bargaining agreements. Upon examination those arguments fail. There has been no abuse of discretion because the magistrate judge and district court's determinations that Local 46 was not a crime victim are supported both by the district court's rulings at sentencing and by the terms of the cooperation agreement. *See e.g., Forest City Daly Housing, Inc. v. Town of North Hempstead,* 175 F.3d 144, 149 (2d Cir. 1999). While Doherty admittedly had a plan to obtain laundered money and then use that money to pay U.S. Rebar's

employees in cash and simultaneously avoid paying taxes and union obligations, the only criminal charge that the Government brought and of which Doherty stands convicted is conspiracy to engage in money laundering in violation of 18 U.S.C. § 1956(h). Doherty pleaded guilty to one count of conspiracy to launder money which, as applicable to Doherty's case requires the Government to prove that a defendant conspired to commit the following offense, to wit:

> . . . knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conduct[ing] or attempt[ing] to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or . . .
>
> (B) knowing that the transaction is designed in whole or in part--
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. . . ;

18 U.S.C. § 1956(a)(1). We agree with the well reasoned ruling of the magistrate judge that:

> the crime of which [Doherty] was convicted-conspiracy to launder money-was "completed" when he received the cash from Castello. In some money laundering cases, a defendant already has cash that needs to be laundered through some financial transaction. Here, however, it was the receipt of the cash from the fraudulent checks that completed the crime. Doherty might have done anything or nothing with the cash after he received it, but the crime of conspiracy to launder money, which here included the crime of laundering money, had already been committed by the time the cash was given to the union workers. It was the common goal of the co-conspirators to turn false checks into cash and there is no basis for finding that the use of that cash to pay union workers was part of the conspiracy.

United States v. Doherty, No. 05-CR-0494(JS)(WDW), 2009 WL 1310877, at *7 (E.D.N.Y. May 7, 2009) (Wall, *Mag. J.*).

Given the elements of the crime to which Doherty pleaded guilty, if we were to adopt the

position that Local 46 advocates, we would have to engage in an expansive redefining of the term "victim." The definition applicable to Local 46's circumstances reads: "[I]n the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, [a victim is] any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C. § 3663A(a)(2). While the language expands what it is that will give rise to a compensable loss when a scheme, conspiracy or pattern is involved, the reference point to which such conspiracy is tied remains the "offense" of which the defendant has been convicted. See 18 U.S.C. § 3663A(a)(1) ("[W]hen sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense. . . ." (emphasis added)). That is, the "scheme, conspiracy, or pattern of criminal activity"

must be an "element" of that "offense" in order for the conduct in the course of the scheme or conspiracy to be considered as a basis for determining compensable harm.

Notwithstanding what Doherty planned to do with the laundered funds once he had them in his possession, the "offense" to which he pleaded guilty was solely and exclusively the conspiracy to engage in money laundering. The cooperation agreement (a) required Doherty to plead guilty to a money laundering conspiracy and (b) barred the Government from prosecuting Doherty for activities related to "defrauding union benefit funds." It is therefore clear that the offense of conviction was not conspiracy to defraud the union. Local 46's expanded definition of "victim" ignores the term "offense" in § 3663A and would force the sentencing court to ascertain some overarching uncharged scheme or conspiracy, one element of which is the specific offense to which the

defendant pleaded guilty.[3]

With reference only to United States v. Santos,

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[3] A decision of the Ninth Circuit could be interpreted to contradict our position, as it states that the amendment to the VWPA overrules the holding in *Hughey* and allows restitution to be granted to those "'harmed in the course of the defendant's scheme even beyond the counts of conviction.'" *United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007) (emphasis in original) (quoting *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir. 1997)). In reaching that conclusion, the Ninth Circuit determined that conduct not specifically mentioned in an indictment charging a conspiracy to manufacture methamphetamine on a specific date and at a specific location, was, in fact, "related conduct" for which restitution could be granted. *Id.* at 999. The Ninth Circuit ordered restitution for damages to a motel caused by the conspirators' manufacturing of methamphetamine that occurred on a different date and in a different city than that alleged in the indictment. *Id.* The case, however, can be read to correspond with the instant decision because the Ninth Circuit, in effect, found that the conduct for which restitution was granted, which was identical to the charged conduct, was a part of the "pattern of criminal activity" that formed the basis of the conspiracy to manufacture methamphetamine. A comparable situation in the case before us would arise if the indictment had identified specific forged checks and a victim suffering a loss as a result of a non-identified forged check that had also been laundered had moved for restitution. That is not this case, however, as Local 46 is asserting victim status based on Doherty's acts of payment to his employees, acts that are different from, and outside of, the charged activities.

128 S.Ct. 2020, 2025 (2008), holding that the term "proceeds" in the money laundering statute is defined as profits, not gross receipts, of an illegal activity, Local 46 argues that because the district court allowed the funds paid to the workers to be deducted from the laundered monies derived from the federal contract scheme for which Doherty would be held accountable, that accommodation proved the laundering scheme included the cash payments to those workers. This, in turn, was proof that Local 46 was a victim of the contract fraud laundering. Although, unlike its consideration of the fraudulent check uttering activity, the district court did allow Doherty to exclude the amounts from the federal contract fraud that were paid to the workers in calculating his sentence, that fact does not justify a finding that the district court abused its discretion by denying Local 46's request for restitution. To the extent that the district court made any finding regarding the federal contract fraud, the court merely

acceded, for sentencing purposes, to the agreement between the Government and the defendant as to the calculation of the proceeds attributable to that fraud. This is further supported by the parties' discussion at sentencing that the total proceeds of that contract fraud overstated its seriousness.

To the extent that Local 46 argues that the Government failed to meet its obligations under the CVRA because it did not support Local 46's restitution claim and, in fact, failed to submit promised support papers, that argument is also unavailing. The CVRA requires the Government to aid crime victims in obtaining restitution. *See* 18 U.S.C. § 3771(c)(1). Because we conclude that the district court did not abuse its discretion in determining that Local 46 is not a "victim" under either the CVRA or the MVRA, the Government did not have any obligation to support its restitution motion.

Appendix A

Conclusion

For the foregoing reasons, we hold the district court did not abuse its discretion in denying Local 46's motion to enforce its rights as a victim, and we DENY the petition for mandamus.

Appendix B – Order of Referral, Dated February 13, 2009

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

- against -

CHARLES DOHERTY
----------X

ORDER OF REFERRAL

Cr. .05-494 (JS) (WDW)

SEYBERT, District Judge:

The above-referenced criminal case is hereby referred to Magistrate Judge William D. Wall for the following purpose:

Pursuant to 18 U.S.C. §3664(d)(6), to determine the amount of restitution due, and prepare proposed findings of fact and a Report & Recommendation for this Court.

Included in this referral are motions [12] and [18] by interested party Metal Lathers Local 46 Pension Fund.

SO ORDERED.

_____
JOANNA SEYBERT
United States District Judge

Dated: CENTRAL ISLIP, NEW YORK
FEB. 13, 2009

Appendix C – Order Adopting Report and Recommendations From the USDC for the EDNY, Dated May 7, 2009 [Pages 27a – 36a]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

-against-

ORDER ADOPTING REPORT & RECOMMENDATIONS
05-CR-0494(JS)(WDW)

CHARLES DOHERTY,

Defendant.
----------X

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SEYBERT, District Judge:

On February 13, 2009, this Court referred an application by Local 46 Metallic Lathers Union and Reinforcing Iron Workers ("Local 46" or "the Union"), joined in by the Building, Concrete,

Appendix C

Excavating & Common Laborers Union Local 731 and its associated benefits funds ("Local 731") and the Cement & Concrete Workers and its associated benefits funds ("CCW") (collectively, "the Funds") for restitution pursuant to the Mandatory Victims Restitution Act of 1996 to Magistrate Judge William D. Wall to report and recommend as to whether the motion should be granted.

On April 27, 2009, Judge wall issued a Report and Recommendation ("R&R") recommending that the Court deny the Funds' application for restitution on the grounds that the Funds were not directly and proximately harmed as a result of the commission of the offense to which Defendant Charles Doherty pled guilty. For the reasons stated below, the Court ADOPTS Magistrate Judge Wall's R&R in its entirety and DENIES the Union's application for restitution.

DISCUSSION

I. Standard of Review

Pursuant to 18 U.S.C. § 3664(d)(6), the Court "may refer any issue arising in connection with

a proposed order of restitution to a magistrate judge . . . for proposed findings of fact and recommendations as to disposition, subject to a de novo determination of the issue by the court." Thus, the Court conducts a de novo review of the R&R issued by Magistrate Judge Wall.

II. Mandatory Victims Restitution Act

The Mandatory Victims Restitution Act ("MVRA") requires a sentencing Court to "order . . . that [a] defendant make restitution to the victim" of certain crimes. 18 U.S.C. § 3663A(a). "The primary purpose of the MVRA is to make victims of crime whole by fully compensating them for their losses." United States v. Scott, No. 08-CR-1489, 2009 U.S. APP. LEXIS 7853, at *2 (2d Cir. Apr. 14, 2009).

III. The Funds' Claims

On September 12, 2005, Defendant Charles Doherty ("Doherty") entered a plea of guilty to a single count of violating 18 U.S.C. § 1956(h), a conspiracy to launder money in violation of 18 U.S.C.

§ 1956, and on February 13, 2009, this Court sentenced Doherty on that count.

Defendant Doherty served as the President of United States Rebar, Inc. ("Rebar"), a company in the business of bending, placing and installing rebar on union job-sites at heavy construction and building projects. The Union maintains that Rebar was a party to collective bargaining agreements that specified certain benefit and dues payments that had to be made to the unions' funds for every hour worked by every union employee. The Funds maintain that Doherty paid the Rebar employees' weekly wages and benefits "directly in cash, off the books, in order to evade the required benefit contributions." (Funds' mot. 6). Doherty cashed Rebar checks to "fictitious vendors" and presented such checks to Joseph Castello ("Castello"), who converted the checks to cash. The Funds argue that this "scheme had the effect of avoiding significant benefit contributions mandated by the applicable [collective bargaining agreements] and

defrauding union benefit funds of vast sums due and owing." (Id. P. 7.) On December 20, 2007, the Funds filed a motion to compel restitution in the amount of $2,045,419.20.

A. The Funds are not Victims Under the MVRA

The MVRA defines a victim as a

> person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern."

18 U.S.C. § 3663A.

Here, Defendant Doherty pled guilty to one count of violating 18 U.S.C. § 1956(h), a conspiracy to launder money in violation of 18 U.S.C.

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§ 1956. Thus, a person may be entitled to restitution only if he or she was directly and proximately harmed as a result of Doherty's conspiracy to launder money. To determine who the victims are of Doherty's offense, the Court must first delve into an analysis of the underlying crime for which Doherty has entered a plea of guilty.

> The money laundering statute states, in pertinent part,
>
> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--
>
> (A) (i) with the intent to promote the carrying on of specified unlawful activity; or
>
> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986 [26 USCS § 7201 or 7206]; or
>
> (B) knowing that the transaction is designed

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in whole or in part–

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine . . . ."

18 U. S.C. § 1956.

The conspiracy provision subjects "[a]ny person who conspires to commit any offense defined in this section . . to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h).

Magistrate Judge Wall found, and the parties do not dispute, that the specific unlawful activity which Doherty engaged in was the uttering of false checks. However, the parties diverge on what "financial transaction" Doherty conducted with the proceeds of the unlawful activity. Magistrate Judge Wall found that the financial transaction was complete when Doherty converted the checks to cash,

which Doherty received directly from Castello. The Court agrees. The money laundering crime was complete when Castello hand-delivered cash to Doherty. At that point, Doherty, conducted a financial transaction by converting checks into cash, and that financial transaction involved the proceeds of an unlawful activity, i.e., forged checks.

The Court rejects the Funds' argument that the financial transaction involved in the money laundering conspiracy was Doherty's payment of cash to his workers with the proceeds of the forged checks. It may be true that Doherty engaged in a broader scheme involving the payment of cash to his employees to avoid certain responsibilities; however, that is not the specific count for which Doherty pled guilty. Doherty pled guilty solely to one count of conspiracy to launder money, a count for which the underlying crime involved the conversion of fraudulent checks to cash with the intent to carry on the unlawful activity of utilizing forged checks. Doherty did not enter a plea of guilty for the separate

and broader scheme of paying workers in cash to avoid certain responsibilities, a crime that the Government has agreed it will not pursue.

Because the underlying crime was completed upon the receipt of cash from the fraudulent checks, the Funds cannot be a victim under the MVRA. While the Funds may have been the unfortunate victims of one of Doherty's uncharged crimes or of a broader, uncharged scheme, the Court is constrained by the MVRA and is not authorized to provide restitution for "conduct outside the scope of that conspiracy" for which Doherty entered a plea of guilty "merely because the conspiracy itself might be a portion of a broader uncharged personal scheme of one of the conspirators." United States v. Donaghy, 570 F. Supp. 2d 411, 428 (E.D.N.Y. 2008). Thus, the Court finds that the Funds did not suffer direct and proximate harm from the crime for which Doherty entered a plea of guilty, and therefore declines to

award the Funds restitution.[1]

CONCLUSION

For the reasons stated above, the Court AFFIRMS Magistrate Judge Wall's Report and Recommendation in its entirety, and DENIES the Funds' motion to compel the payment of restitution.

SO ORDERED.

/s/ JOANNA SEYBER
Joanna Seybert, U.S.D.J.

Dated: Central Islip, New York
May 7, 2009

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[1] The Court has considered and rejects Doherty's argument that the Funds lack standing to file objections to the R&R. The Court agrees that victims have a limited voice, and lack standing under the MVRA to challenge or appeal a district court's ruling with respect to restitution. See Rendon Galvis v. Murillo-Bejerano, 2009 U.S. App. LEXIS 8815 (2d Cir. Apr. 27,2009). Victims, or persons seeking victim status, are given "a voice, not a veto." United States v. Rubin, 558 F. Supp. 2d 411,418 (E.D.N.Y. 2008). However, here, the Court has not yet made a ruling. The Magistrate Judge has made a recommendation, and the Funds are voicing their opinion as to whether the Court should adopt the Recommendation. Thus, the Court has fully considered the Funds' objections to the R&R.

Appendix D – Report and Recommendations From the USDC for the EDNY, Dated April 27, 2009 [Pages 37a – 63a]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

Plaintiff(s), **REPORT AND RECOMMENDATIONS**

-against- CV05-CR-494(JS)(WDW)

CHARLES DOHERTY,

Defendant(s).
----------X

WILLIAM D. WALL,
United States Magistrate Judge:

Before the court, on referral from District Judge Seybert, is an application for restitution pursuant to the Mandatory Victims Restitution Act of 1996 ("MVRA") by Local 46 Metallic Lathers Union and Reinforcing Iron Workers ("Local 46" or "the Union"), joined in by the Building, Concrete, Excavating & Common Laborers Union Local 731 and its associated benefits funds ("Local 731") and the Cement & Concrete Workers and its associated benefits funds ("CCW")(collectively, "the Funds").

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For the reasons set forth in this Report, the undersigned recommends that no restitution be awarded, because the arguments set forth by the defendant in the supplemental briefs establish that the Funds did not suffer direct harm from the crime to which Charles Doherty pled guilty, and thus were not victims pursuant to the MVRA. In the event that this recommendation is not adopted by Judge Seybert, I recommend that restitution be awarded on the base figure of $1,988,981.170, with prejudgment interest but not double interest pursuant to ERISA.

Because of the time constraints regarding the restitution award, the time to raise objections to this Report and Recommendation is shortened from 10 days to 4 days, with any objections due on May 1, 2009. Any response to the objections must be filed by May 4, 2009.

BACKGROUND

The Information against defendant Charles Doherty stated, *inter alia*, that:

On or about and between January 1, 1998 and

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> July 31, 2002 . . . Charles Doherty conspired to conduct financial transactions affecting interstate commerce, which in fact involved the proceeds of specified unlawful activity, to wit: uttering forged checks, in violation of Title 18, United States Code, Section 513, theft concerning programs receiving federal funds, in violation of title 18, United States Code, Section 666, mail fraud, in violation of Title 18, United States Code, Section 1341 . . .
>
> DE[18], Ex. C.

Doherty entered into a Cooperation Agreement and a plea of guilty before Judge Seybert on September 12, 2005. *See* DE[47], Exs. A & B. He was sentenced on February 13, 2009 for a single count of violating 18 U.S.C. §1956(h), a conspiracy to launder money in violation of 18 U.S.C. §1956. *See id.*, Ex. C. Prior to the sentencing, in December 2007, Local 46 applied for a restitution award DE[18], and the defendant opposed the application by letter dated December 21, 2007 DE[19]. At the sentencing, Judge Seybert referred the matter to me to determine the amount of restitution due, if any. DE[32]. At a

conference before me on March 6, 2009, counsel for the movant union, the defendant, and the government appeared, and, after it was determined that the matter could not be settled, a supplemental briefing schedule was set. *See* Transcript of Hearing, attached as Ex. C to DE[42]. The Union's supplemental brief (DE[42]), the defendant's opposition (DE[47]), the Union's reply (DE[42]), and the defendant's sur-reply DE[52] are now before the court. The government takes no position on the restitution issue and has submitted no papers.

Doherty's company, United States Rebar, was in the business of bending, placing and installing rebar, that is, reinforcing steel rods, on union job-sites at heavy construction and building projects. The Union reports that most of US Rebar's workforce was made up of two union trades: (1) metal lathers or ironworkers who bent and installed the rebar and (2) laborers who carried the steel. According to the Funds, the majority of US Rebar's union workforce during the time relevant to Doherty's criminal

activity was metal lathers from Local 46. The remainder of the union workforce - the laborers- were, according to the Union, almost exclusively members of Local 731 and CCW. The Union states that US Rebar was a party to collective bargaining agreements (CBAs) that required payments to the union funds for every hour worked by union employees, and that Doherty engaged in a scheme to "pay certain weekly wages and benefits of U.S. Rebar employees directly in cash, off the books, in order to evade the required benefit contributions." DE[18] at 5-6. Doherty wrote US Rebar checks to fictitious vendors and presented them to his co-conspirator, check casher Joseph Castello, for conversion to cash, some of which Doherty then distributed to US Rebar's union employees. *Id.* at 6. This scheme, the Union argues, "had the effect of avoiding significant benefit contributions mandated by the applicable CBAs and defrauding union benefit funds of vast sums due and owing," thus making the Funds victims of Doherty's crime and entitling them to restitution. *Id.* at 7.

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DISCUSSION

Based on Doherty's underlying crime and failure to pay benefit contributions, the Union argues that the Funds should receive restitution pursuant to the MVRA. Doherty argues that the Funds cannot receive restitution because they are not victims under the terms of that statute, which defines a victim as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." 18 U.S.C.§3663A(a)(2). The Funds argue that Doherty waived this argument and conceded that they are victims.

As noted *supra*, the Union originally filed its restitution request in December 2007. Doherty responded with a short letter dated December 21, 2007 that asked Judge Seybert to set a schedule for a

reply and briefing. DE[19] Doherty also argued that no restitution should be awarded because of civil suits that had been filed by the movants against him. He did not argue that the Union was not a victim under the MVRA. The Funds now construe the December 21 letter as having conceded that the Funds are victims and argue that Doherty's repeated failures to raise this issue amount to a waiver. DE[49] at 1-2. The court does not agree. It is true that the first time that Doherty appears to have raised the argument that the Funds are not victims under the MVRA is in the supplemental papers allowed by the undersigned at the March 6 conference. Nonetheless, Doherty is correct in arguing that the court cannot find a waiver of this issue. The court has no inherent power to award restitution but may do so only on the terms set forth by statute. *See United States v. Donaghy*, 570 F. Supp. 2d 411, 423 (E.D.N.Y. 2008). The court cannot ignore the requirements of the statute just because a party has not raised them. Further, the defendant

raised the arguments in a supplemental brief allowed by court. No waiver took place.

Nor does law of the case establish that the Funds are MVRA victims. The Funds note that, at Doherty's sentencing hearing, Judge Seybert stated that Mr. Doherty "shall pay restitution," and that she referred the matter to me for a determination of the "amount" of restitution due. I do not interpret those statements to indicate a formal finding by Judge Seybert that the Funds were victims. Implicit in Judge Seybert's comments is the concept that Doherty shall pay restitution if the Funds qualify under the statute, and that I shall recommend an amount if the statutory standards are met. Thus, I turn to the argument raised by Doherty that the Funds are not MVRA victims because they were not directly and proximately harmed as a result of the commission of the offense to which Doherty pled guilty and for which he was convicted.

A defendant sentenced under the MVRA, Doherty argues, "is only responsible to pay restitution

for the conduct underlying the offense for which he has been convicted," here, the money laundering conspiracy with Castello. *Id.* at 2 (quoting *U.S. v. Adams*, 363 F.3d 363, 366 (5th Cir. 2004)). Thus, he continues, the Funds can be victims under the MVRA only if they were directly harmed by the specific money laundering conspiracy for which Doherty was convicted. This argument somewhat conflates the issues of whether the Funds are victims and to what extent a victim is entitled to restitution. Those issues overlap, however, under the circumstances before the court, as the discussion will reflect. Doherty was convicted of conspiracy to launder money, with Joseph Castello as his co-conspirator,[1] and the existence of the conspiracy is significant to the determination of whether the Funds are victims. As noted earlier, the MVRA defines a victim as someone

---

[1] Castello was prosecuted in a separate proceeding. The court is aware of no effort by the funds to seek restitution from Castello, although co-conspirators can, under some circumstances, be jointly and severally liable for restitution. *See Donaghy*, 570 F. Supp. 2d at 423-24.

who, in the case of an offense that involves a conspiracy as an element, is directly and proximately harmed by that conspiracy. The court must thus determine precisely what the crime that Doherty was convicted of entailed. Relevant to that determination, Doherty urges that when, as here, a defendant is convicted pursuant to a plea agreement, the Court defines the underlying crime by looking beyond the charging instrument to the "mutual understanding of the parties," including a consideration of the plea agreement and statements made by the parties during the plea and sentencing hearings. DE[47] at 2 (citing *United States v. Adams*, 363 F.3d 363, 366-67 (5th Cir. 2004)). The court will examine those sources.

Doherty notes that his Cooperation Agreement with the government states that "no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity involving his . . . defrauding union benefit funds, and all related money laundering." *Id.* at 2-3. He also

looks to the transcript of the plea hearing to support his contention that his guilty plea did not encompass defrauding union benefit funds such as the Funds. *Id.* at 3 & Ex. A. Although he used some of the illegally gotten cash to pay union employees, he explains, "depriving union benefit funds of contributions was not part of the money laundering conspiracy to which he pleaded guilty . . . [and] the money laundering conspiracy involved only the forging of checks and other conduct . . ." irrelevant to the Funds' claim. *Id.* Relying on colloquy at the Sentencing Hearing, he urges that he was convicted "only for a money laundering conspiracy that was completed once he received the cash from the check casher, and . . . potentially defrauding the union funds was a *separate, secondary* scheme for which Mr. Doherty has not been charged or convicted. *Id.* at 5. While it is true, he continues, that he "used the proceeds of the forged checks to engage in other activity, including paying workers in cash, that particular use of the proceeds was not part of the conspiracy to

launder money, nor did it violate any of the elements of the money laundering conspiracy." *Id.* at 5-6. The elements of that crime included uttering false checks and a minority business enterprise fraud unrelated to the Funds. *Id.* at 6. Therefore, he concludes, the Funds are not 'victims' (within the meaning of the MVRA) of Mr. Doherty's money laundering crime." *Id.* at 5 & Ex. C at 17-22.

The Funds do not agree, calling Doherty's interpretation of his money laundering conspiracy conviction "tortured." DE[49] at 3. The money laundering statute, 18 U.S.C. §1956, provides in pertinent part that:

> (a)(1)Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity —
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; . . .
>
> (B) knowing that the transaction is designed in whole or in part —
>
> (i) to conceal or disguise the

> nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity. . .

The conspiracy provision, 18 U.S.C. 1956(h), provides that "Any person who conspires to commit any offense defined in this section . . . shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." The crime of conspiracy to launder money is proven when the government shows that "the defendant agreed with another to commit the offense; that he knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy, and that an overt act in furtherance of the conspiracy was committed." *United States v. Huezo*, 546 F.3d 174, 181 (2d Cir. 2008) (citation omitted).

In order to understand Doherty's argument and the Funds' objection to it, we must look to each parties' definition of the"unlawful activity" and the "financial transaction" elements of the crime to

which Doherty pled guilty. The Information defines the "specified unlawful activity" as uttering false checks, theft from programs receiving federal funds, and mail fraud. DE[18], Ex. C. The parties seem to agree that those acts constitute the "specified unlawful activity." They differ, however, on what constituted the "financial transaction" element of the crime. Doherty asserts that the passing of the cash by Castello to Doherty was the financial transaction. DE[52] at 4. The Funds argue that Castello's giving of cash to Doherty was part of the underlying specified unlawful activity, and that subsequent acts, including paying the workers with the ill-gotten cash, constitute the financial transactions at issue. DE[49] at 7. Under that construction of the crime, they argue, they were directly harmed by Doherty's completion of an element of the crime he pled guilty to and are victims under the MVRA,

The court agrees with Doherty that the crime of which he was convicted - conspiracy to launder money- was "completed" when he received the cash

from Castello. In some money laundering cases, a defendant already has cash that needs to be laundered through some financial transaction. Here, however, it was the receipt of the cash from the fraudulent checks that completed the crime. Doherty might have done anything or nothing with the cash after he received it, but the crime of conspiracy to launder money, which here included the crime of laundering money, had already been committed by the time the cash was given to the union workers. It was the common goal of the co-conspirators to turn false checks into cash and there is no basis for finding that the use of that cash to pay union workers was part of the conspiracy. Instead, that use was, as Doherty urges, a separate scheme. As the *Donaghy* court explained in its analysis of the extent to which the victim NBA was entitled to restitution, although the definition of victim in the MVRA is broad, that statute "only permits recovery for conduct that was part of the applicable scheme, conspiracy, or pattern of conduct that is the offense of conviction." 570 F.

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Supp. 2d at 426 (citations omitted).

I reach the conclusion that the Funds are not MVRA victims without reference to the government's agreement not to prosecute Doherty for his failure to report and pay benefit contributions to the Funds. That agreement alone would not necessarily bar the Funds from qualifying as victims. As Doherty himself has recognized, the MVRA "does allow for recovery for uncharged or acquitted conduct that is part of the scheme, conspiracy or pattern of criminal conduct that was an element of the offense of conviction," but "it does not allow for recovery for acts committed in furtherance of a broader uncharged scheme being carried on by one of the coconspirators." *See* DE[47] at 6-7 (citing *Donaghy*, 570 F. Supp. 2d at 427). The payment in cash to union workers and the concomitant failure to pay benefit contributions is just such a "broader uncharged scheme carried on by one of the co-conspirators" - Doherty. Although the Funds were directly harmed by that broader scheme, they were not harmed by the conspiracy of which

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Doherty was convicted and are not victims of the offense of conviction.

In reaching this conclusion, the court is not blind to the harm suffered by the Funds as a result of Doherty's criminal activities, but is constrained by the requirements of the MVRA to find that the Funds did not suffer the direct and proximate harm from the convicted crime that the statute requires. Presumably, the Funds will pursue the civil remedies that are available to them.

Amount of Restitution:

Although I have recommended that the Funds are not victims under the MVRA, I will include recommendations on the amount of restitution sought, so that it will be before Judge Seybert in the event that she does not adopt the above recommendation. The presentation of the amount of alleged loss here is somewhat unusual. The MVRA requires, and the Second Circuit has held, the the government bears the burden of proving the amount of loss sustained by the victim by a preponderance of

the evidence. 18 U.S.C. §3664(e); *United States v. Reifler*, 446 F.3d 65, 122 (2d Cir. 2006); *Donaghy*, 570 F. Supp. 2d at 423. Here, the government has taken no position on the restitution and provided no proof of loss whatsoever. I note this anomaly for the record, but note further that the government has not argued that the Funds are entitled to no restitution, and I will consider the Funds' proof of loss.

Despite Doherty's arguments to the contrary, it is clear that a restitution award "need only to be a reasonable estimate of the victim's actual losses." *See Donaghy*, 570 F. Supp. 2d at 423 and cases cited therein. "Although estimates are appropriate, a court must base its restitution award on more than mere speculation about a victim's actual losses." *Id.* (citing *United States v. Catoggio*, 326 F.3d 323, 329 (2d. Cir. 2003)). Uncertainties with respect to the amount should be resolved in favor of the victim. *Id.* (citations omitted). The appropriate measure of loss is the "value of the property wrongfully taken by the defendant." *Id.* at 424 (citing 18 U.S.C.

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§§3663(b)(1)(B), 3663A(b)(1)(B), & *United States v. Sapoznik,* 161 F.3d 1117, 1121 (7th Cir. 1998)). Here, no money was literally "taken" from the Funds, but they were deprived of the benefits contributions that Doherty should have made on behalf of his union workers and the court will consider that as the Funds' measure of loss.

In its original filing, the Union sought $2,045,419.20 in restitution. DE[18] at 10. In their supplemental papers, the Funds seek $3,838,358.22 as of the date of filing, including awards of interest and liquidated damages. DE[42]. The Funds state that the base restitution figure should be $2,209,979.68. *Id.* at 7. They explain that their reasonable estimate started with the amount of $11,168,000, the amount Doherty pled guilty to laundering between 1/1/98 and 7/31/02. They then reduced that amount by 5% to reflect the fees charged to Doherty by Castello, bringing the base figure to $10,609,600, all of which, they claim, was used to pay US Rebar's union workers. Next, they applied a

"fraud multiple," which they define as the percentage of the total hourly package, that is, wages, dues, and benefits, for Doherty's union workers for which they are seeking reimbursement. *Id.* Excluded from the calculation of the fraud multiple are benefit contributions for the Vacation and Annuity Funds, because such payments are required to be held in subaccounts for individual workers and not for the Unions at large. DE[18] at 15, n.7; DE[42] at 7-8, n.5. Other deductions were made for Local 731 and CCW. *See* DE[42] at 7-8, n.5. The Funds have provided tables setting forth the fraud multiple calculations on a year to year basis, along with tables of the hourly rates required under the relevant CBAs, rates on which the fraud multiples are based. *See* DE[18], Exs. E & F; DE[42], Exs D, E, F, G, H, I & J. Application of a fraud multiple of 20.83% results in a base restitution figure of $2,209,979.68.

In their reply brief, the Funds reduce the base restitution figure somewhat, based on arguments raised by Doherty in his opposition. They accept

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Doherty's claim that not all of the laundered money was used for cash payments to union workers but instead was diverted to Doherty and his now deceased partner, and/or was paid to Dick Carpinello. Based on those claims, the Funds state that the base figure should be reduced by $300,000 to reflect cash kept by Doherty and by some further amount to reflect payments to Carpinello, but no hard figure is set forth. The court will rely on Doherty's own acknowledgment that "over 90%" of the $11,168,000 which he admitted laundering was used to pay workers, and will use $10,051,200, that is, 90% of $11,168,000, as the starting point. Reduced by Castello's 5% fee, that amount becomes $9,548,640. Multiplying that amount by the fraud multiple of 20.83% results in a base restitution figure of $1,988,981.170 and the court recommends that figure be used.

The Funds set forth several reasons why the base restitution figure is "extremely conservative," despite the fact that uncertainties about restitution

amounts are to be resolved in favor of the victim." DE[42] at 8 (citing *Donaghy*, 570 F. Supp.2d at 423). Those reasons are (1) the exclusion of cash payments made by Doherty from 1996 through 12/31/97; (2) use of the lowest fraud multiple that could be determined; (3) acceptance at face value of Doherty's claim that he paid his union workers their full hourly package, that is, both wages and benefits; and (4) treatment of all cash payments as having been made to Journeyman members and not Apprentices, an approach that resulted in a significantly lower fraud multiple. *Id.* at 8-9. Add to that the reductions for cash that went to Doherty and Carpinello.

Doherty argues that no reasonable estimate of the Funds' actual losses is possible and that an amount that is conservative in favor of the defendant is just as unreasonable as one that favors the victim unreasonably. I find that although the evidence that the Funds use to calculate their base restitution amount might well "push the envelope" of acceptability under the MVRA, that it does provide a

basis for arriving at a *reasonable* estimate and is far from mere speculation. To conclude otherwise would reward Doherty for committing a crime that is not susceptible to more precise calculation, and would subvert the underlying goal of the MVRA, that is, to make the victim whole. *See Donaghy*, 570 F. Supp.2d at 423. While it is true, as Doherty argues, that a much more precise calculation could be arrived at using "actual evidence showing who received case, how much they received, when they received it, and the purpose of the payments," that evidence is not available as a result of Doherty's criminal activity, and he should not be rewarded for its absence.

Doherty raises numerous other arguments against the amounts sought, all of which are adequately defeated by the Funds in their Reply memorandum. *See* DE[49] at 11 - 17. The court will comment on one of the arguments, that is, that a restitution award would result in a windfall to the Funds. *See* DE[47] at 18-19. Doherty argues, in essence, that any recovery by the Funds for pension

contributions would be a "pure windfall" because there is no dispute that they have already received those monies and the benefits will not go to the individuals who "earned" them. DE[47] at 16-19. The Funds argue that there will be no windfall resulting from the fact that pension credits will not be awarded to specific workers because contributions to the pension funds are not directed to sub-accounts for individuals. Instead, "employer contributions to the Pension Fund are used to both fund previously vested pensions of retirees and to make it more likely that the Pension Fund (which is currently underfunded) will be able to meet its future obligations to past, current, and future members." DE[49] at 13. Given that it is the Funds that are victims, and not the individual workers, there would be no windfall. The court agrees and finds no evidence in the record to support a finding that those benefits were already paid to the Funds. Nor does the court find merit in Doherty's numerous other objections. The base restitution amount of $1,988,981.170 is a reasonable

estimate of the Funds' actual loss and, should Judge Seybert determine that the Funds are victims pursuant to the MVRA, it should be the figure used to calculate the restitution amount.

The Funds also seek prejudgment interest and statutory "double interest," or liquidated damages, pursuant to ERISA. The court agrees that the Funds are entitled to pre-judgment interest, but the ERISA double interest request raises questions. There is no doubt that unions receive double interest awards, also called liquidated damages, based on delinquent contributions in ERISA cases. *See* 29 U.S.C. §1132(g)(2)(C). Here, however, the Funds are not proceeding in an ERISA action and the court agrees with Doherty that there is no basis for awarding double interest.

The court turns next to the problem of the prior civil lawsuits by the Funds against Doherty, one of which ended in a settlement and one of which was discontinued by the plaintiffs. In his opposition, Doherty recognizes that this court is not bound by the

civil settlement. Rather, he argues, that settlement was entered into with the Funds' full knowledge of the criminal prosecution, and that the amount voluntarily arrived at in the settlement should be the amount used by this court. I do not agree. The amount arrived at in a settlement in a civil action, which may or may not have been based on fraudulent representations by Doherty, should not control the amount of restitution.

Finally, I find that the court cannot specify the allocation of restitution among the three unions based on the chart provided by Local 46. *See* DE[49], Ex. J. If a restitution award is made, the unions will have to work out among themselves how those monies are to be divided.

OBJECTIONS

A copy of this Report and Recommendation is being sent to counsel for the parties and the movant by electronic filing on the date below. Because of the time constraints, an expedited objection schedule must be set. *See United States v. Barney*, 568 F.2d

134, 136 (9th Cir. 1978) (ten day period in which to object is a maximum, not a minimum, and court may require a response within a shorter period if "exigencies of the calendar" require); *Hispanic Counseling Center v. Inc. Village of Hempstead,* 237 F. Supp. 2d 284, 289-90 (E.D.N.Y. 2002). As noted earlier, any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 4 days, that is, no later than **May 1, 2009**, with any response to be filed by **May 4, 2009.** Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. §636 (b) (1); Fed. R. Civ. P. 72; *Beverly v. Walker,* 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants Bank,* 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
April 27, 2009

s/ William D. Wall
WILLIAM D. WALL
United States Magistrate Judge

Appendix E – Judgment From the USDC for the EDNY, Dated February 13, 2009 [Pages 64a – 75a]

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Eastern District of New York

UNITED STATES OF AMERICA,	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number CR 05-494(JS)
CHARLES DOHERTY	USM Number 71635-053
(AUSA Burton Ryan)	
	James Drucker, Esq. Defendant's Attorney

THE DEFENDANT:

X pleaded guilty to count(s) 1 of the Information on 9/12/2005

☐pleaded nolo contendere to count(s)_____ which was accepted by the court.

☐was found guilty on count(s)._____ after a plea of not guilty

The defendant is adjudicated guilty of these offenses:

Title & Section	18 USC 1956(h)
Nature of Offense	CONSPIRACY TO LAUNDER FUNDS DERIVED FROM UTTERING FALSE CHECKS, THEFT FROM PROGRAMS RECEIVING FEDERAL

Appendix E

FUNDS, AND MAIL FRAUD

Offense Ended	7/31/2002
Count	1

The defendant is sentenced as provided in pages 2 though 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984

☐The defendant has been found not guilty on count(s)._____

☐Count(s)_____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Feb. 13, 2009
Date of Imposition of Judgment

JOANNA SEYBERT, U.S.D.J
Name and Title of Judge

Feb. 13,2009
Date

Appendix E

A TRUE COPY, ATTEST: ROBERT C. HEINEMANN, CLERK
By: Dated: Feb. ,2009

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 4-Probation

Judgment—Page 2 of 5

DEFENDANT: CHARLES DOHERTY
CASE NUMBER: CR 05-494(JS)

PROBATION

The defendant is hereby sentenced to probation for a term of: 3 YEARS

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug tests
thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance

abuse. *(Check, if applicable.)*

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check ,if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 *U.S.C.* § 16901, *et seq.)* as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check ,if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of probation that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district

without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons

engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix E

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 4A-Probation

Judgment—Page 3 of 5

DEFENDANT: CHARLES DOHERTY
CASE NUMBER: CR 05-494(JS)

ADDITIONAL PROBATION TERMS

The defendant shall pay the fine.

The defendant shall pay restitution, as determined following hearing by Magistrate Judge Wall, to whom the matter is referred.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 5-Criminal Monetary Penalties

Judgment—Page 4 of 5

DEFENDANT: CHARLES DOHERTY
CASE NUMBER: CR 05-494(JS)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 15,000.00	$

Appendix E

X The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination. **THE MATTER IS BEING REFERRED TO MAG. JUDGE WALL FOR DETERMINATION.**

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(1), all nonfederal victims must be paid before the United States is paid.

Name of Payee

Total Loss*

Restitution Ordered

Priority or Percentage

TOTALS $_____ $_____

☐ Restitution amount ordered pursuant to plea agreement $_____

Appendix E

X The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived for the fine ☐ restitution.

☐ The interest requirement for the ☐ fine restitution is modified as
Follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/08) Judgment in a Criminal Case
Sheet 6-Schedule of Payments

Judgment—Page 5 of 5

DEFENDANT: CHARLES DOHERTY
CASE NUMBER: CR 05-494(JS)

Appendix E

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or
☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below; or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence_____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

Appendix E

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties:

FINE OF $15,000. SHALL BE PAID WITHIN 90 DAYS.

RESTITUTION WILL BE ASSESSED FOLLOWING A DETERMINATION BY MAG. JUDGE WALL, TO WHOM THE MATTER IS REFERRED.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Appendix E

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.
☐ The defendant shall pay the following court cost(s):
☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (I) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Appendix F – Order From the USCA for the Second Circuit, Filed May 22, 2009 [Pages 76a – 77a]

United States Court of Appeals,
FOR THE
SECOND CIRCUIT

At the stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 22nd day of May, two thousand and nine,

Present:

Hon. Dennis Jacobs,
Chief Judge,

Hon. Chester J. Straub,
Hon. Peter W. Hall,
Circuit Judges.

In re LOCAL # 46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,
****
****

United States of America,

Appellee,

Charles Doherty,

Defendant-Appellee, Docket No.[s]:
v. 09-2113-op

Metal Lathers Local 46 Pension Fund,

Movant-Appellant,

Appendix F

Upon consideration of the petition for mandamus filed on May 19, 2009, by Petitioner Local #46, it is ORDERED that the petition is denied. An opinion will follow. See 18 U.S.C. § 3771(d)(3).

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

By: Lucille Carr

Appendix G – United States Code Annotated Currentness – Title 18 – Crimes and Criminal Procedures, Effective October 17, 2000 [Pages 75a – 83a]

18 U.S.C.A. § 3663A Page 1

Effective: October 17, 2000

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 232. Miscellaneous Sentencing Provisions
§ 3663A. Mandatory restitution to victims of certain crimes

(a)(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense de-scribed in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person

directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

(3) The court shall also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(b) The order of restitution shall require that such defendant--

(1) in the case of an offense resulting in damage to or loss or destruction of property of a victim of the of-fense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to--

(i) the greater of--

Appendix G

18 U.S.C.A. § 3663A Page 2

(I) the value of the property on the date of the damage, loss, or destruction; or

(II) the value of the property on the date of sentencing, less

(ii) the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim--

(A) pay an amount equal to the cost of necessary medical and related professional services and devices re-lating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury that results in the death of the victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, reimburse the victim for lost income and necessary child care, transportation, and other ex-penses incurred during participation in the investigation or prosecution of the offense or attendance at pro-ceedings related to the offense.

(c)(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense--

(A) that is--

(i) a crime of violence, as defined in section 16;

(ii) an offense against property under this title, or under section 416(a) of the Controlled Substances Act (21 U.S.C. 856(a)), including any offense committed by fraud or deceit; or

(iii) an offense described in section 1365 (relating to tampering with consumer products); and

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

Appendix G

(2) In the case of a plea agreement that does not result in a conviction for an offense described in paragraph (1), this section shall apply only if the plea specifically states that an offense listed under such paragraph gave rise to the plea agreement.

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that--

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

CREDIT(S)
(Added Pub.L. 104-132, Title II, § 204(a), Apr. 24, 1996, 110 Stat. 1227, and amended Pub.L. 106-310, Div. B, Title XXXVI, § 3613(d), Oct. 17, 2000, 114 Stat. 1230.)

Appendix G

Current through P.L. 111-78 approved 10-19-09

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END OF DOCUMENT

Appendix H – United States Code Annotated Currentness – Title 18 – Crimes and Criminal Procedures, Effective July 27, 2000 [Pages 84a – 92a]

18 U.S.C.A. § 3771

Effective: July 27, 2006

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 237. Crime Victims' Rights (Refs & Annos)
§ 3771. Crime victims' rights

(a) Rights of crime victims.--A crime victim has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceed-ing, involving the crime or of any release or escape of the accused.

(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be

materially altered if the victim heard other testimony at that proceeding.

(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sen-tencing, or any parole proceeding.

(5) The reasonable right to confer with the attorney for the Government in the case.

(6) The right to full and timely restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

(b) Rights afforded.–

(1) In general.--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination de-scribed in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The

reasons for any decision denying relief under this chapter shall be clearly stated on the record.

(2) Habeas corpus proceedings.--

(A) In general.--In a Federal habeas corpus proceeding arising out of a State conviction, the court shall en-sure that a crime victim is afforded the rights described in paragraphs (3), (4), (7), and (8) of subsection (a).

(B) Enforcement.--

(i) In general.--These rights may be enforced by the crime victim or the crime victim's lawful representat-ive in the manner described in paragraphs (1) and (3) of subsection (d).

(ii) Multiple victims.--In a case involving multiple victims, subsection (d)(2) shall also apply.

(C) Limitation.--This paragraph relates to the duties of a court in relation to the rights of a crime victim in Federal habeas corpus proceedings arising out of a State conviction, and does not give rise to any obligation or requirement applicable to personnel of any

agency of the Executive Branch of the Federal Government.

(D) Definition.--For purposes of this paragraph, the term "crime victim" means the person against whom the State offense is committed or, if that person is killed or incapacitated, that person's family member or other lawful representative.

(c) Best efforts to accord rights.--

(1) Government.--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

(2) Advice of attorney.--The prosecutor shall advise the crime victim that the crime victim can seek the ad-vice of an attorney with respect to the rights described in subsection (a).

(3) Notice.--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

Appendix H

(d) Enforcement and limitations.--

(1) Rights.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

(2) Multiple crime victims.--In a case where the court finds that the number of crime victims makes it im-practicable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

(3) Motion for relief and writ of mandamus.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and de-cide such application forthwith

within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

(4) Error.--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

(5) Limitation on relief.--In no case shall a failure to afford a right under this chapter provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if--

(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

(C) in the case of a plea, the accused has not pled to the highest offense charged.

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This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.

(6) No cause of action.--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be 'construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

(e) Definitions.--For the purposes of this chapter, the term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons ap-pointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

Appendix H

(f) Procedures to promote compliance.--

(1) Regulations.--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

(2) Contents.--The regulations promulgated under paragraph (1) shall--

(A) designate an administrative authority within the Department of Justice to receive and investigate com-plaints relating to the provision or violation of the rights of a crime victim;

(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such em-ployees and offices in responding more effectively to the needs of crime victims;

(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with

provisions of Federal law pertain-ing to the treatment of crime victims; and

(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.

CREDIT(S)

(Added Pub.L. 108-405, Title I, § 102(a), Oct. 30, 2004, 118 Stat. 2261, and amended Pub.L. 109-248, Title II, § 212, July 27, 2006, 120 Stat. 616.)

AMENDMENT OF SUBSECTION (D)(5)(B)

<Pub.L. 111-16, §§ 3(12), 7, May 7, 2009, 123 Stat. 1608, 1609, provided that, effective Dec. 1, 2009, subsec. (d)(5)(B) is amended by striking "10 days" and inserting "14 days".>

Current through P.L. 111-78 approved 10-19-09

Appendix I – Information [Pages 93a – 96a]

MJl:BTR
F#2005R00992
DOHERTY. Inf

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X
UNITED STATES OF AMERICA

- against -

CHARLES DOHERTY,

Defendant.
----------X

INFORMATION

Cr. .No. _____
(T. 18, U.S.C., §§982, 1956(h) and 3551 et seq.)

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE
(Conspiracy To Launder Money)

1. On or about and between January 1, 1998 and July 31, 2002, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendant CHARLES DOHERTY, together with others, did knowingly and intentionally conspired to conduct financial transactions affecting

interstate commerce, which in fact involved the proceeds of specified unlawful activity, to wit: uttering forged checks, in violation of Title 18, United States code, Section 513, theft concerning programs receiving federal funds, in violation of Title 18, United States Code, Section 666, and mail fraud, in violation of Title, 18, United States Code, Section 1341, knowing that the property involved in the financial transactions represented the proceeds of some form of unlawful activity (a) with the intent to promote the carrying on of the specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(i), and (c) to avoid a transaction reporting requirement under State and Federal Law, in violation of Title 18, United States Code, Section 1956(a)(1)(B)(ii).

(Title 18, United States Code, Sections 1956(h) and 3551 et seq.)

Appendix I

CRIMINAL FORFEITURE ALLEGATION

2. The United States hereby gives notice to the defendant charged in Count One that, upon his conviction of such offence, the government will seek forfeiture in accordance with Title, 18, United States Code, Section 982, of all property involved in the offence of conviction in violation of Title 18, United States Code, Section 1956, or conspiracy to commit such offence, and all property traceable to such property as a result of the defendant's conviction of Count one of the information, including, but not limited to, $11,168,000 in United States currency.

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

Appendix I

c. has been placed beyond the jurisdiction of the Court;

d. has been substantially diminished in value; or

e. has been commingled with other property, which cannot be divided without difficulty;

it is the intent of the United States, pursuant to Title 18, United States Code, Section 982, to seek forfeiture of any other property of the defendant up to the value of the forfeitable property described in this forfeiture allegation.

(Title, 18, United States Code, Section 982)

ROSLYNN R. MAUSKOPF
UNITED STATES ATTORNEY
EASTERN DISTRICT OF
NEW YORK

Appendix J – Transcript of Plea, Dated September 12, 2005 [Pages 97a – 133a]

SEALED RECORD

1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, : CR 05 494

v. : U.S. Courthouse
Central Islip,
N.Y.

CHARLES DOHERTY, :

TRANSCRIPT
OF PLEA

Defendant, :

September 12, 2005
----------x 2:10 p.m.

S-E-A-L-E-D R-E-C-O-R-D

BEFORE :

HONORABLE JOANNA SEYBERT, U.S.D.J.

Appendix J

APPEARANCES :

For the Government : ROSLYNN R. MAUSKOPF
United States Attorney
100 Federal Plaza
Central Islip, New York 11722
By: BURTON RYAN, ESQ.
RICHARD LUNGER, ESQ.
Assistants, U.S. Attorney

For the Defendant : KASE & DRUKER
By: JAMES DRUKER, ESQ.

Court Reporter: HARRY RAPAPORT, C.S.R.
U.S. District Court
100 Federal Plaza
Central Islip, New York 11722
(631) 712-6105

SEALED RECORD
Proceedings recorded by mechanical stenography.

Transcript produced by computer-assisted transcription.

THE CLERK: For guilty plea, United States versus Charles Doherty.

Appendix J

MR. RYAN: For the government, Burton Ryan and Richard Lunger. .Good afternoon.

MR. LUNGER: Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. DRUKER: Good afternoon, your Honor, James Druker, Kase and Druker of Garden City on behalf of Mr. Dohenty.

THE COURT: Good afternoon. I understand there will be a disposition?

MR. DRUKER: Yes, your Honor.

THE COURT: We will have the defendant sworn in.

(The defendant is sworn.)

THE COURT: Mr. Doherty, you have been sworn in. It means you must tell the truth. If you don't tell the truth you can be charged with perjury and face additional jail time. You understanding that?

THE DEFENDANT: Yes.

THE COURT: Are you willing to answer the

questions under oath knowing the consequences of not telling the truth?

THE DEFENDANT: Yes.

SEALED RECORD

Page 3

THE COURT: If at any time you don't understand a question, let me know that. If you don't know the answer to a question, let me know that. If at any time you wish to talk to your lawyer in private, let me know that and I will afford you an opportunity to discuss the case with him outside the presence of everyone else, all right?

THE DEFENDANT: Yes.

THE COURT: You have a form here if you wish to review it before you go on, go ahead.

THE DEFENDANT: Yes.

THE COURT: Did you need more time?

MR. DRUKER: No, your Honor. Dotting some I's and crossing some T's.

Appendix J

THE COURT: You are presumed to be innocent right now. You don't have to prove anything. The government must prove your guilt beyond a reasonable doubt before you can be convicted of anything. You understand that, sir?

THE DEFENDANT: Yes.

THE COURT: You understand if I accept your plea of guilty that presumption of innocence is gone. You understand that?

THE DEFENDANT: Yes.

THE COURT: There is no longer any issue as to

SEALED RECORD

Page 4

whether or not you committed the serious felony you are admitting by pleading guilty today. You understand that?

THE DEFENDANT: Yes.

THE COURT: Prior to coming to court today,

have you had any drugs, alcohol, medication have any kind?

THE DEFENDANT: No.

THE COURT: Are you currently under the care of any physician?

THE DEFENDANT: No.

THE COURT: Or any health related problem?

THE DEFENDANT: No.

THE COURT: How far have you gone in school?

THE DEFENDANT: College graduate.

THE COURT: What do you do for a living.

THE DEFENDANT: Run a Rebar Construction Company.

THE COURT: What kind of company is that?

THE DEFENDANT: Construction contracting and an engineering firm.

THE COURT: Is that commercial?

THE DEFENDANT: Yes.

THE COURT: And how long have you been

doing that?

THE DEFENDANT: 11 years.

THE COURT: Now, with respect to your rights, you understand that in addition to your presumption of

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innocence, you have the Fifth Amendment right. You don't have to testify against yourself or make statements against yourself. However, if you plead guilty you will be giving up that right and your right to go to trial. You know at a trial the government is required to prove you guilty beyond a reasonable doubt before there is any conviction. You would be represented by counsel as you currently are. If you didn't have sufficient funds to continue counsel's representation, counsel will be appointed for you. You understand that?

THE DEFENDANT: Yes.

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THE COURT: At a trial you can subpoena witnesses on your behalf. You would have a right to cross-examine witnesses against you. You can testify if you wanted to. If you didn't want to testify I would advise the jury that they couldn't consider the failure to testify. You understand that?

THE DEFENDANT: Yes.

THE COURT: However, if you plead guilty all those rights are gone and you subject yourself to certain penalties which I will review with you in a moment. You understand that?

THE DEFENDANT: Yes.

THE COURT: Now, you have a right to have this case, since it is a felony charge, presented to a grand

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jury and for the grand jurors to make a determination as to whether or not they believe there

is sufficient evidence to warrant holding you for trial. You understand that?

THE DEFENDANT: Yes.

THE COURT: By way of charging you with an indictment, you know, on an indictment. You understand that, sir?

THE DEFENDANT: Yes.

THE COURT: And with this waiver of indictment, you have discussed this with Mr. Druker?

THE DEFENDANT: Yes.

THE COURT: You understand you are giving up the requirement for the government to present this case to the grand jury, and you are saying it is sufficient for you to enter a plea based on your -- the accusations of the U.S. Attorney. You understand that?

THE DEFENDANT: Yes.

THE COURT: And you have reviewed those charges and your rights with your attorney and signed this form in open court today, and that's your

signature there, right?

THE DEFENDANT: Yes.

THE COURT: Any questions?

THE DEFENDANT: No, your Honor.

THE COURT: The waiver is therefore approved.

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Now, with respect to the charges to which you seek to plead guilty, you understand that this is a money laundering charge?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the information charges you with the type of crime that would carry up to 20 years in jail, three years of supervised release if you are sent to jail, and, of course, if you violate the terms of your supervised release you can be sent back to jail and serve more than 20 years in Jail. You understand that?

THE DEFENDANT: Yes, your Honor.

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THE COURT: And it also subjects you to certain other penalties, including a fine of up to $500,000, or twice the value of the monetary instrument or funds involved in the money laundering charge. In addition, restitution, if there is any, will be determined by the Court, and you may be required to pay restitution. I am not familiar enough with the underlying facts in this case to make a statement with regard to that one way or the other. Do you understand that, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Further, you must pay a $100 special assessment, and you have also had an opportunity, I believe, to review the consequences of your forfeiture agreement that has been proposed?

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THE DEFENDANT: Yes.

THE COURT: And you are subjecting yourself

to certain --

(Telephone rings.)

THE COURT: Mr. Ryan, every time an assistant gets a call, I have to say to myself: Why do assistants have cell phones and why do defense lawyers not have cell phones? You are no less credible in this court than Mr. Druker or any other attorney. It is quite a nuisance, and I believe your office should have a new policy of making you leave the cell phones down on the sixth floor. It is really outrageous.

MR. RYAN: I got the message.

THE COURT: I don't want them in my courtroom any more. If they are not good enough to have them then you are not good enough to have them. And the irresponsibility of allowing one side to continue in this fashion and not another is impossible. No one should have them. I don't have them. From now one keep it downstairs and spread the word.

MR. RYAN: I will leave the message.

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THE COURT: Thank you. And I appreciate it.

Moving on, sir, during this important event in your life.

Now, I want you to understand with respect to got

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this criminal forfeiture agreement you are giving up the variety of sources of income and property you have, and it amounts to something like $500,000; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: You also understand that the guidelines, now after speaking with Mr. Druker, you discussed this case with him obviously and the rights you are giving up?

THE DEFENDANT: Yes.

THE COURT: You are satisfied with his

services?

THE DEFENDANT: Yes.

THE COURT: Mr. Druker, any reason you can think of why the plea should not go forward?

MR. DRUKER: No, your Honor.

THE COURT: You also understand, Mr. Doherty, that guidelines are advisory only, and I'm still required to the review them. And there are certain provisions in this cooperation agreement with regard to a downward adjustment for acceptance of responsibility, and a possibility of an additional downward adjustment if you pled guilty to -- I have in the cooperation agreement July 15th, 2005. Is that a typo, Mr. Ryan, or did I have an older one and now you have a new one.

MR. RYAN: I think you have an old one, Judge.

THE COURT: They always like to give me the old

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stuff.

Any other changes I should be aware of since I have the old one?

MR. RYAN: No, Judge.

THE COURT: So, it is October 15th?

MR. RYAN: Yes.

THE COURT: The loan of October 15th that the government would move for an additional downward adjustment of one level. So, a total of three for acceptance of responsibility if it ~s applicable. You understand that, Mr. Doherty?

THE DEFENDANT: Yes, your Honor.

THE COURT: You also understand what your obligations are under this obligation --cooperation agreement as far as being fully debriefed attending meetings; not revealing any cooperation to third parties unless you get permission of the government in advance; doing undercover work if it is required;

consenting to adjournment of your sentence[and forfeiting the items you indicated you would forfeit. And also disclosing all the particular property that you have available to you; is that correct, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: Additionally, you know the terms of this forfeiture agreement is basically you are paying

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$100,000, I believe, today, if I accept your plea of guilty, you are going to pay $400,000 within 60 days of today or November 1, 2005, whichever date is earlier?

THE DEFENDANT: Yes, your Honor.

THE COURT: You know how you are to transfer those funds to the U.S. Attorney's Office, in particular delivering it to Mr. Lunger who is present here today; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Additionally, you understand that this particular sum of money represents monies that are traceable to or constitute substitute assets for the criminal activity that is alleged in the information?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right.

Additionally, you understand that you are promising to assist the government to allow them to obtain any assets that should be forfeited, and you are going to give then whatever title, or anything you have with regard to items that have been disclosed today?

THE DEFENDANT: Yes, your Honor.

THE COURT: And to your knowledge, you have revealed all of the assets that you should reveal; is that correct?

THE DEFENDANT: Yes.

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THE COURT: And you looked a~ these provisions and you understand that that would include certain properties that are located in Freeport; specifically property and premises at 268 and 332 North Main Street in report; is that correct, sir?

THE DEFENDANT: Yes, your Honor.

THE COURT: What type of property is that?

THE DEFENDANT: They are commercial buildings.

THE COURT: All right.

Additionally, sir, you understand that you are waiving any issues with respect to a jury trial on those forfeited items; that you are waiving any defenses you might have which would be double jeopardy, ex post facto, excessive fine and statute of limitations; is that correct, sir?

THE DEFENDANT: Yes.

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THE COURT: And additionally, you know that this forfeiture does not and cannot be considered as payment of a fine or payment of any income taxes that may be due?

THE DEFENDANT: Yes.

THE COURT:, Sir, unless you violate this particular cooperation agreement. you understand that let me start over again.

The U.S. Attorney's Office is saying provided that you don't violate the terms of the agreement, and you

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follow the agreement, that you will not be charged for anything else with respect to your so-far-disclosed participation in criminal activity involving your fraud in connection with federal disadvantaged business enterprise programs, defrauding union benefit funds and all related money laundering with regard to your, or in connection with your own involvement of United

States Rebar, Rebar, Inc., all from the period of 1999 through 2004. Is that right, Mr. Doherty?

THE DEFENDANT: Yes, your Honor.

THE COURT: And no statements that you made during the course of your cooperation or will make will be used against you, unless you actually violate the terms of the cooperation?

THE DEFENDANT: Yes.

THE COURT: And you represent that you are a duly authorized individual in terms of representing the United States Rebar and all current companies that you hold any office in?

THE DEFENDANT: Yes.

THE COURT: You have an ownership interest and you basically manage the day-to-day operations of Rebar; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: But this particular cooperation

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agreement and the charges here under the information are solely as to the individual?

MR. RYAN: Yes, your Honor.

THE COURT: You are not attempting to get any plea from the corporation or any board of directors?

MR. RYAN: That's correct.

THE COURT: Is that correct, Mr. Doherty?

THE DEFENDANT: Yes, sir, your Honor.

THE COURT: Additionally, sir, you understand that you and your company agree to provide the government --by that I mean the Department of Transportation and the Department of Labor and the office of the U.S. Attorney of the Eastern District of New York with compiled quarterly financial reports and an annual audited financial statement with respect to your company and a certificate of compliance with all those regulations

from all those various agencies; is that correct?

THE DEFENDANT: Yes, your Honor.

THE COURT: Additionally you agree you will meet with the U.S. Attorney's Office and be debriefed without your attorney unless you want your attorney there and certainly Mr. Druker has every right to be present.

Additionally, you understand that your requirement here of having counsel present, while you are entitled to it, it may delay proceedings, and at the end

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it may impact on how strong your 5Kl letter is or is not. You understand all that?

THE DEFENDANT; Yes.

THE COURT: Additionally, you understand that provided the *U.S.* Attorney does so in good faith, they will determine whether or not you have provided substantial assistance in order to get such a 5K

letter; do you understand that?

THE DEFENDANT: Yes.

THE COURT: And that would allow me using the guidelines as advisory solely to make a determination as to whether or not, in order to give you any special consideration with regard to a downward departure. All right?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the U.S. Attorney's Office cannot promise any specific sentence. It doesn't recommend any specific sentence to the Court. And I will be the one sentencing you to whatever sentence I deem appropriate after considering the divine lines. All right?

THE DEFENDANT: Yes.

THE COURT: You know you can't sue the government. You are not a prevailing party. You are not entitled to any additional disclosure with respect to your

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plea of guilty here. You agree to pay the special assessment and the forfeiture as indicated earlier, on or before sentence; is that correct, sir?

THE DEFENDANT: Yes.

THE COURT: You know that you are required to give complete, truthful and accurate information; and that you must not commit any crimes or attempt to commit any crimes. If you violate any of the terms of the agreement the government will, of course, oppose any downward adjustment for acceptance of responsibility. They will file a notion for upward departure, possibly. And, of course, they will make a recommendation then to the Court, if they so choose, as to what sentence you should be sentenced to, and any statement you made could be used against you, and you have give~ up the statute of limitations and any other defense, and in addition to be charged with perjury or obstruction of justice. You under stabbed

that?

THE DEFENDANT: Yes.

THE COURT: Finally, any rights you have under the Federal Rules will be gone should you violate the terms of this agreement with respect to the voluntariness of your statement, the statute of limitations and a variety of any other rights that you might have under the Federal Rules. You understand that, sir?

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THE DEFENDANT: Yes.

THE COURT: You know the agreement doesn't bind any other federal, state or local authorities from prosecuting yell, and you can also be subject to civil and administrative proceedings. You understand that?

THE DEFENDANT: Yes.

THE COURT: You know that this particular agreement that you have now signed supersedes and

takes over any other agreement or understanding that you previously had with the government?

THE DEFENDANT: Yes.

THE COURT: Any other statements or promises been made to you or conditions other than those contained in the cooperation agreement?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you are guilty and for no other reason?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you have signed this cooperation agreement with discussing it with counsel?

THE DEFENDANT: Yes.

THE COURT: Can you tell me what it is, Mr. Doherty, that you did with respect to the conspiracy to commit money laundering.

THE DEFENDANT: From approximately 1998

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THE COURT: You have to slow down because we need an accurate record.

THE DEFENDANT: From the approximately 1998 to 2002, as a principal of U.S. Rebar, I took corporate checks to a check casher in Brooklyn, Staten Island and Queens, all in the Easter~ District of New York, as well as other places. The checks were payable to fictitious vendors. In exchange for the checks I received cash after the check casher subtracted his fees.

I knew this was done by me for purposes of paying certain employees in cash, thereby allowing them to avoid reporting a portion of their income to the IRS.

I knew that it was wrong and illegal. Some of these employees worked on federally-funded Department of Transportation contracts which was procured by my firm.

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THE COURT: For the purpose of getting the cash to the particular employee, that was to qualify as a minority owned business? Tell me why it is that you used this procedure, why you took fictitious vendors, cashed those monies. They were your employees, sir?

THE DEFENDANT: Yes.

THE COURT: You used those so the employees would get the benefit of getting cash?

THE DEFENDANT: Yes.

THE COURT: And you didn't have to pay what --

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tell me what you were looking to avoid.

THE DEFENDANT: It was actually a bonus for them to be able to get more than they would traditionally take home by getting paid in cash.

THE COURT: Were you paying FICA and those type of things?

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THE DEFENDANT: No, your Honor

THE COURT: It wasn't that much of a benefit in terms of their benefits. If they had been employees with the union, wouldn't they have gotten a higher salary and more benefits?

THE DEFENDANT: We actually paid them the full amount that they would have gotten in cash.

THE COURT; So, you basically were giving a benefit to your employees by laundering money in this fashion in order to avoid tax consequences for your employees? I want to understand what went on here, sir. And I didn't get an opportunity to review the original complaint here.

MR. RYAN: Judge, the proof the government would have is that there are a number different means by which checks were generated between Rebar and this illegal check casher.

The method that was described was the primary method, which was writing checks either to former

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customers or to fictitious customers that were supplied by the check casher in order to take money out of corporation to create a cash horde that was untraceable so the cash can be given to the employees to avoid tax consequences of additional income as well as other responsibilities they have should they be involved in other activities such as union membership and other benefits in which the amount of their earnings would require them to make other payments.

In addition, there were income checks to Rebar company diverted to the check casher and then not reported as income to Rebar which was cashed. And this was a smaller amount.

THE COURT: How much was that?

MR. DRUKER: I believe a few million dollars. And that is a smaller amount compared to the overall amount of checks involved.

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THE COURT: All that was for employees?

MR. RYAN: No, checks made out to Rebar, Inc. That never ended up in the books and records of the company.

THE COURT: The first group?

MR. RYAN: All of the money went either for various corporate related activities as far as we could tell. And these, of course, violated those relative to the federal contract violate 666. Those related to the

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fictitious corporations that were then endorsed and signed on the back, those would be falsely completed or forged checks. And then all of these, of course, would generate false banking records and, therefore, be mail fraud. And that's the basis for the money laundering.

THE COURT: Is there anything else the government would like to ask the defendant?

MR. RYAN: No, judge. I believe he made out

the elements.

MR. DRUKER: I would like to point out one thing, Judge.

The moneys generated by the check cashing, it is my understanding went entirely to pay corporate expenses, including these employees. I didn't want your Honor to have any impression that Mr. Doherty was lining his pockets with any of this money.

THE COURT: I just wanted to know where the money was going and what the structure was with respect to union benefits that employees could have obtained.

Sir, how do you plead to count one of the information?

THE DEFENDANT: Guilty, your Honor.

THE COURT: The Court accepts your plea of guilty, and finds you made a knowing and voluntary waiver of your rights, and you understand the consequences of

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pleading guilty, and there is a factual basis to believe that this crime was committed.

You have a preliminary order of forfeiture, Mr. Lunger?

MR. LUNGER: Yes, we do, your Honor, and we would like to hand it up today.

THE COURT: You are asking me to sign it and you have the original?

MR. LUNGER: We hand up one of the duplicate originals at this time. And it is no different than what I handed Mr. Baran.

THE COURT: This is an original for real?

MR. LUNGER: Yes, your Honor.

If I May, your Honor, I believe the defendant has a $100,000 check he would like to present to the government on the record today.

THE COURT: Do you have that?

MR. DRUKER: I have it here, and I will hand

it to Mr. Lunger now.

MR. LUNGER: Let the record reflect that Mr. Druker handed me a check made payable to the United States Department of Treasury, in the amount of $100,000, and drawn on account --drawn at F-U-L-L-E-R-T-O-N, Fullerton Community Bank. And it is a cashiers check made payable to the U.S. Department of Treasury.

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THE COURT: All right.

What date are we looking at in terms of sentence? I gather it is going to be some period of time?

MR. RYAN: It will be, Judge. I would say at the end of the first quarter of 2006.

THE COURT: Why don't we put it over to mid-April. April 21st; 2006.

In terms of the defendant going to probation, it is probably somewhat premature at this point, or can

we get the process started?

MR. RYAN: I believe we can get the process started. And if there are limitations we can let probation know at that time. At least they can gather the information.

THE COURT: It doesn't appear to be the kind of case that would require him to hold back going to probation. His cooperation has already occurred?

MR. RYAN: Yes, your Honor.

THE COURT: So, it is more a question of effectuating any other related arrests.

THE CLERK: April 21st, any choice of time?

MR. DURKER: 10:00 a.m. good?

THE COURT: You got it.

MR. DRUKER: Your Honor, just a couple of requests.

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I believe the government has agreed to allowing Mr. Doherty to remain free on his own

recognizance and without travel restrictions of any kind if it is amenable to your Honor.

MR. RYAN: That's fine.

THE COURT: It doesn't appear he presents any risk and in view of the forfeiture and other issues, all right.

MR. DRUKER: Lastly, would your Honor consider the sealing of the transcript of today?

MR. RYAN: We will order the minutes if we can do that?

THE COURT: Yes.

MR. RYAN: And we will unseal it as the related cases go forward.

THE COURT: All right. Right now it can be sealed.

MR. LUNGER: I would just ask to have a copy of the signed order so it can be sent to the treasury department along with the check.

THE COURT: Yes.

Can I have the bail bond? You have reviewed

that sir?

THE DEFENDANT: Yes.

THE COURT: And you continue to represent that

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you will abide by the conditions of this bond?

THE DEFENDANT: Yes.

THE COURT: In addition to all the other conditions of your plea agreement end cooperation agreement; is that right?

THE DEFENDANT: Yes, your Honor.

THE COURT: The financial statement, you keep that?

MR. RYAN: It is part of the plea agreement.

THE COURT: I may need it later on sentencing.

(End of proceedings.)

(2)

No. 09-670

In The
Supreme Court of the United States

LOCAL #46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, following the denial of a petition for mandamus under the Crime Victims' Rights Act of 2004 ("CVRA"), 18 U.S.C. § 3771(d)(3), an alleged victim has standing to file a petition for a writ of certiorari, given that the CVRA provides victims only a limited appellate right to mandamus review before a circuit court of appeals, with very short filing and disposition time frames, and a crime victim is not an actual "party" to the underlying criminal case?

2. Whether the court of appeals properly determined that multiemployer trust funds were not victims entitled to restitution under the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A(a)(2), where the trust funds were not directly and proximately harmed by the criminal defendant's conduct in furtherance of the lone offense of conviction - a conspiracy to commit money laundering through a fraudulent check cashing scheme that was completed when the check casher delivered the cash to the defendant - but instead, were harmed, if at all, by the defendant's separate use of the cash to pay employees off the books and his corresponding, uncharged, fraudulent failure to have the employer report the hours worked to the funds or make payments to the funds for those hours, as required by certain collective bargaining agreements?

PARTIES TO THE CASE

The parties to this criminal case are Respondents the United States of America and Charles Doherty ("Doherty").

In the criminal proceeding below, Petitioner Local #46 Metallic Lathers Union and Reinforcing Iron Workers and its associated benefit and other funds (the "Funds") sought an award of restitution. Doherty disputes the Funds' status as parties to this case.

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B. The Funds are not "parties" to this criminal action and, therefore, lack standing to file a petition for a writ of certiorari under 28 U.S.C. § 1254(1). 14

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OPINIONS BELOW

The Court of Appeals for the Second Circuit entered its opinion on June 9, 2009. The court's decision is reported at *In re Local #46 Metallic Lathers Union and Reinforcing Iron Workers, et al.*, 568 F.3d 81 (2d Cir. 2009). The district court's opinion, adopting the report and recommendation of the magistrate judge, is unreported, but can be found at *United States v. Doherty*, 2009 WL 1310877 (E.D.N.Y. May 7, 2009).

JURISDICTION

This Court lacks jurisdiction over the petition for a writ of certiorari because the Funds lack standing to seek such review. The Funds filed a petition for mandamus with the Court of Appeals for the Second Circuit on May 19, 2009. On May 22, 2009, the Court of Appeals issued an order denying the petition, noting that an opinion would follow. The Court of Appeals entered its opinion on June 9, 2009. As discussed below, because the Government opted not to seek a writ of certiorari, the Court of Appeals' decision is the final level of review available to the Funds. Therefore, this Court does not have jurisdiction to consider the Funds' petition for a writ of certiorari.

INTRODUCTION

The Funds' petition for a writ of certiorari should be denied. The Funds lack standing to seek review by this Court and there is no real conflict among the circuit courts that warrants review.

First, the CVRA provides an appellate mandamus remedy with the circuit court of appeals for alleged victims unhappy with a district court's ruling; however, the mandamus remedy comes with very short filing and disposition deadlines; and the CVRA conspicuously fails to provide alleged victims with a right to any further relief. To the contrary, the CVRA gives the Government alone the right, in its discretion, to appeal an adverse decision regarding an alleged victim. Therefore, because the Government opted not to seek review in this Court, the Funds' appellate review rights ended with the Court of Appeals' denial of their petition for mandamus.

Second, there is no split among the circuit courts that warrants review by this Court, especially given the facts of this case. The Funds argue that there is a split among the circuit courts regarding whether persons who were not named in an indictment or plea agreement, but were harmed by closely related criminal conduct of the defendant, can be treated as victims under the MVRA, 18 U. S.C. § 3663A(a)(2). The Funds are mistaken in two respects.

Preliminarily, the Funds wrongly assume a close "relatedness" between defendant Doherty's lone crime of conviction - conspiracy to commit money laundering - and the loss of contributions the Funds allegedly suffered. In fact, the lower courts in this case conclusively ruled that Doherty's conspiracy to commit money laundering was completed when Doherty received cash for fraudulent checks from a check casher, and (2) Doherty's subsequent use of the cash to pay employees off the books and then have United States Rebar, Inc. ("U.S. Rebar") defraud the Funds out of contributions for the hours those employees

worked by not reporting the hours worked or paying the contributions due for those hours, were separate and distinct crimes, that involved materially different acts and elements, for which Doherty was neither charged nor convicted. Consequently, the Funds' premise their petition on facts that are contrary to those established by the courts below.

Further, none of the decisions the Funds cite actually extended victim status to persons, like the Funds, who were harmed by criminal conduct that was separate and distinct from the offense of conviction. Although some circuit courts have extended victim status to individuals directly and proximately harmed by the conspiracy or scheme of conviction, even if they were not expressly named in the indictment or plea agreement, those courts agree that victim status does not extend to one harmed by uncharged criminal conduct that was separate and distinct from the conspiracy or scheme of conviction.

Accordingly, the Court of Appeals correctly denied the Funds' petition for mandamus under settled law and there is no reason to grant further review.

STATEMENT OF THE CASE

The Government charged Doherty with engaging in a conspiracy to launder money that involved three unlawful activities - uttering forged checks, theft concerning programs receiving federal funds, and mail fraud. In 2005, Doherty pleaded guilty to a single count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). At the plea hearing, Doherty admitted that he forged checks from U.S. Rebar payable to fictitious vendors, which he then

provided to Joseph Castello, a check casher, who cashed the checks and then delivered the cash, minus a fee, to Doherty. Doherty also admitted that he used the cash he received from Castello to pay U.S. Rebar's employees off the books, and that he subsequently failed to have U.S. Rebar (1) report the hours worked to the Funds, or (2) contribute to the funds for the unreported hours. 568 F.3d at 82.

Before pleading guilty, Doherty signed a Cooperation Agreement with the Government. The Cooperation Agreement stated, in part, that "no criminal charges will be brought against the defendant for his heretofore disclosed participation in criminal activity involving his fraud in connection with federal disadvantaged business enterprise programs, *defrauding union benefit funds*, and all related money laundering." 2009 WL 1310877, *6.

During the sentencing phase, the Funds moved for an award of restitution as alleged crime victims under the CVRA and the MVRA. After extended proceedings, including multiple rounds of briefing and argument, the Magistrate Judge concluded that the Funds were not "victims" as defined under the MVRA.[1]

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[1] The MVRA, 18 U.S.C. § 3663A(a)(2), defines the term "victim" as follows:

> For purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered, including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

The Magistrate Judge reasoned in pertinent part as follows:

> *The court agrees with Doherty that the crime of which he was convicted - conspiracy to launder money - was "completed" when he received the cash from Castello* .... Doherty might have done anything or nothing with the cash after he revived it, but the crime of conspiracy to launder money, which here included the crime of laundering money, had already been committed by the time the cash was given to the union workers. *It was the common goal of the conspirators [Doherty and Castello] to turn false checks into cash and there is no basis for finding that the use of that cash to pay union workers was part of that conspiracy. Instead, that use was, as Doherty urges, a separate scheme.*
>
> .... As Doherty himself has recognized, the MVRA "does allow for recovery for uncharged or acquitted conduct that is part of the scheme, conspiracy or pattern of criminal conduct that was an element of the offense of conviction," but "it does not allow for recovery for acts committed in furtherance of a broader uncharged scheme being carried on by one of the co-conspirators. [Citation omitted.] *The payment in cash to union workers and the concomitant failure to pay benefit contributions is just such a "broader uncharged scheme carried on by one of the con-conspirators" - Doherty. Although the Funds were directly harmed by that broader scheme, they were not harmed by the conspiracy of which Doherty was*

> *convicted and are not victims of the offense of conviction.* (Emphasis added.)

2009 WL 1310877, *7.

The District Court adopted the Magistrate Judge's report and recommendation. In so doing, the District Court similarly rejected the Funds' argument that they were directly and proximately harmed by the offense of conviction:

> Magistrate Judge Wall found, and the parties do not dispute, that the specific unlawful activity which Doherty engaged in was the uttering of false checks. However, the parties diverge on what "financial transaction" Doherty conducted with the proceeds of the unlawful activity. *Magistrate Judge Wall found that the financial transaction was complete when Doherty converted the checks to cash, which Doherty received directly from Castello [the check casher]. The Court agrees.* At that point, Doherty conducted a financial transaction by converting checks into cash, and that financial transaction involved the proceeds of an unlawful activity, *i.e.*, forged checks.
>
> The Court rejects the Funds' argument that the financial transaction involved in the money laundering conspiracy was Doherty's payments of cash to his workers with the proceeds of the forged checks. *It is true that Doherty may have engaged in a broader scheme involving the payment of cash to his employees in order to avoid certain responsibilities; however, that is*

> *not the specific count for which Doherty pled guilty ....*
>
> *Because the underlying crime was completed upon the receipt of cash from the fraudulent checks, the Funds cannot be a victim under the MVRA .... Thus, the court finds that the Funds did not suffer direct and proximate harm from the crime for which Doherty entered a plea of guilty, and therefore declines to award the Fund restitution.* (Emphasis added.)

2009 WL 1310877, *2 - *3.

The Funds next sought mandamus relief from the Court of Appeals for the Second Circuit pursuant to the CVRA, 18 U.S.C. § 3771(d)(3). Within the time limit set forth in that Section, the Court of Appeals denied the Funds' petition, and subsequently issued a thirteen page written opinion on June 9, 2009, which held that the district court did not err or abuse its discretion. Like the lower courts, the Court of Appeals determined that the Funds were not directly or proximately harmed by the conspiracy of conviction, but instead, were harmed, if at all, by a conspiracy that was separate and distinct from the conspiracy of conviction:

> *The district court adopted the magistrate judge's report and recommendation in its entirety, finding that Local 46 had not been directly and proximately harmed by Doherty's money laundering because the offense was compete at the moment Castello handed the cash to Doherty.* The court agreed that restitution was not available under the MVRA for harm

caused by the actions of a single conspirator acting outside the conspiracy as part of a broader uncharged scheme ....

....

Local 46 argues that the money laundering conspiracy to which Doherty pleaded guilty included Doherty's cash payments to union workers. *The dispositive issue is therefore whether the conspiracy to launder money for which Doherty was convicted was complete when Castello [the check casher in the money laundering conspiracy] transferred the cash to Doherty or whether it included making the cash payments to [U.S. Rebar's] employees with the monies received in the laundering process.* It is those cash payments, Local 46 alleges, that deprived it of benefits due under collective bargaining agreements. *For the reasons that follow, we hold that the district court did not abuse its discretion in determining that the conspiracy charge to which Doherty pleaded guilty did not encompass the activity of which Local 46 was a victim.*

....

Given the elements of the crime to which Doherty pleaded guilty, if we were to adopt the position that Local 46 advocates, we would have to engage in an expansive redefining of the term "victim." .... While the language expands what it is that will give rise to compensable loss when a scheme, conspiracy or pattern is involved, the reference point to which such a conspiracy is

> tied remains the "offense" of which the defendant has been convicted ....
>
> *Notwithstanding what Doherty planned to do with the laundered funds once he had them in his possession, the "offense" to which he pleaded guilty was solely and exclusively the conspiracy to engage in money laundering. The cooperation agreement (a) required Doherty to plead guilty to a money laundering conspiracy, and (b) barred the Government from prosecuting Doherty for activities relating to "defrauding union benefit funds." It is therefore clear that the offense of conviction was not conspiracy to defraud the union.*

568 F.3d at 84 - 87.

REASONS FOR DENYING THE WRIT

I. THE FUNDS LACK STANDING TO FILE A PETITION FOR A WRIT OF CERTIORARI.

The Petition should be denied because the Funds lack standing to ask this Court to hear the case. The CVRA expressly grants alleged victims one appellate right - an opportunity to file a petition for a writ of mandamus with the court of appeals. Congress' omission of any other rights of review for alleged victims, coupled with (1) the extremely short time frames imposed on the mandamus review, and (2) the fact that Congress gave the Government the right (but not the obligation) to seek further review on behalf of an alleged victim, demonstrates that Congress intended to limit an alleged victim's appellate rights to

filing a petition for mandamus with the court of appeals.

A. The plain language of the CVRA demonstrates that Congress did not intend for alleged crime victims to be able to seek appellate review beyond the filing of a petition for mandamus.

The CVRA narrowly prescribes a victim's appellate rights and necessarily excludes seeking review in this Court. Section 3771(d), titled "Enforcement and *Limitations*," (emphasis added), states in this regard as follows:

> (3) **Motion for relief and writ of mandamus.** - The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. *If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter.* If the court of appeals denies the

> relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.
>
> (4) **Error.** - In any appeal in a criminal case, *the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.* (Emphasis added.)

18 U.S.C. § 3771(d). Thus, Congress crafted a narrow mandamus remedy for alleged victims under CVRA, but stopped short of giving them full appellate rights. Instead, Congress gave the Government the right, but not the obligation, to pursue matters on behalf of an alleged victim under normal appeal channels, which include filing a petition for a writ of certiorari.

The Funds acknowledge that the CVRA does not expressly grant alleged victims the right to seek review of a denial of a petition for a writ of mandamus (Petition at 8), but proceed to argue, based on certain legislative history, that Congress nevertheless intended for victims to have such a right when it enacted the CVRA. The Funds' reliance on legislative history and policy arguments is misguided and violates fundamental principles of statutory interpretation.

It is well-settled that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.'" *National R. R. Passenger Corp. v. Nat'l Ass'n of R. R. Passengers,* 414 U.S. 453, 458 (1974) *quoting Botany Worsted Mills v. United States,* 278 U.S. 282, 289 (1929). Further, to whatever

extent the judiciary has the power to imply or create remedies, "it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 732 (1989).

Here, Congress crafted a narrow appellate remedy with extremely short time-frames so as to not unduly delay the sentencing process. Therefore, adding more remedies, especially those that will substantially delay the final resolution of the sentencing process, should be avoided, because they would substantially undermine Congress' clear intent.

The foregoing point is reinforced by the fact that numerous courts have held that alleged victims do not have a right to appeal restitution orders or criminal sentences, and that their only appellate right is to file a petition for a writ of mandamus. As the Court of Appeals for the Tenth Circuit explained in *United States v. Hunter*, 548 F.3d 1308, 1313-1315 (10th Cir. 2008):

> A series of restitution cases, however, stands for the proposition that nonparties have no right to post-judgment appeals in criminal cases . . .
>
> ....
>
> Several provisions of the CVRA further support our conclusion. *The CVRA explicitly provides for a single avenue through which individuals may seek appellate review of the district court's application of the statute:*

> *mandamus. Given that the CVRA contains this express remedy, we are reluctant to read additional remedies - including the right to a direct appeal - into it . . . .*
>
> Moreover, the CVRA provides that "[i]n any appeal in a criminal case, *the Government* may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal applies." 18 U.S.C. § 3771(d)(4) (emphasis added). If Congress contemplated that 'victims' could take a direct appeal, then surely that provision would read that either the victims or the government could assert victims' rights on appeal. *Instead, the provision allowing "the Government" to assert victims' rights indicates that Congress did not expect victims to assert their own rights through post-judgment appeals.* (Emphasis added.)

See also United States v. United Sec. Sav. Bank, 394 F.3d 564, 567 (8th Cir. 2004); *United States v. Johnson*, 983 F.2d 216, 220-21 (11th Cir. 1993); *United States v. Grundhoefer*, 916 F.2d 788, 792 (2d Cir. 1990).[2]

Accordingly, this Court should not undermine Congress' decision to give alleged victims a limited

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[2] Contrary to the Funds' assertion, the fact that the CVRA requires the courts of appeals to issue written decisions does not support a conclusion that Congress intended for alleged victims to be able to petition this Court for review. Simply put, Congress required the appellate courts to issue written decisions to insure that the courts articulated the rationale for their decisions, notwithstanding the extremely short time frames Congress imposed on the mandamus process.

right of appellate review with very short time frames, by judicially creating another right of review that will substantially delay the finality of the sentencing process.

B. The Funds are not "parties" to this criminal action and, therefore, lack standing to file a petition for a writ of certiorari under 28 U.S.C. § 1254(1).

The Funds also wrongly rely on 28 U.S.C. § 1254(1) to obtain review in this Court. Section 1254(1) provides that "cases" in the courts of appeals may be reviewed by this Court "upon the petition of any party to any civil or criminal case . . . ." The mere fact that the Court of Appeals heard this case below, however, does not give the Funds "party" status needed to file a petition for a writ of certiorari.

A party to litigation is "[o]ne by or against whom a lawsuit is brought." *U.S. ex rel. Eisenstein v. City of New York, New York*, 129 S. Ct. 2230, 2234 (2009), *citing* Black's Law Dictionary 1154 (8th Ed. 2004). Clearly, the parties to this case are the United States of America and the defendant Charles Doherty.

The mere fact that the Funds were involved in a case before a court of appeals pursuant to the CVRA's mandamus review provision does not mean that they have general "party" status. The Funds argue that because they were involved in the mandamus proceedings, and because Section 1254(1) states that "any party to any civil or criminal case" may petition for a writ of certiorari, it reasonably follows that they were a party and can file this petition; however, the Funds cannot bootstrap their way into party status by

relying on the fact that the CVRA granted them the right to obtain mandamus review by the court of appeals.

Further, the Funds' reliance on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), for the general proposition that this Court has not restricted party status to those named as such in the litigation, is misplaced. *Devlin* involved a civil class action lawsuit in which the Court held that a non-named member of the plaintiff class had the right to appeal the district court's approval of a settlement. Important distinctions between civil and criminal cases, however, dictate that *Devlin* should not be extended to victims who intervene in criminal cases.

As the Court of Appeals for the Tenth Circuit explained in *Hunter*, 548 F.3d at 1308:

> *Devlin*, like many of the cases that the Antrobuses cite, is a civil case . . . there is an important distinction between civil and criminal cases. Civil cases often implicate the pecuniary rights of non-parties . . . .
>
> Criminal trials, on the other hand, place an individual citizen against the United States government. While non-parties may have an interest in aspects of the case, they do not have a tangible interest in the outcome. This distinction is evidenced by our procedural rules. The Federal Rules of Civil Procedure allow non-parties to intervene to assert their rights. *See* Fed. R. Civ. P. 24. The Federal Rules of Criminal Procedure contain no comparable provision. This distinction recognizes that non-

> parties often have a unique interest in civil cases. Because non-parties do not have a comparable unique interest in the outcome of criminal trials, we do not consider *Devlin* or *Plain* persuasive in this case.

The Tenth Circuit's sound reasoning in *Hunter* should be followed here.

The Funds also wrongly argue that they are parties to a "case" because they were parties to the mandamus petition, which is a "case" under 28 U.S.C.S. § 1254, as interpreted by the Court in *Hohn v. U.S.*, 524 U.S. 236, 240 (1998). The Funds' reliance on *Hohn* is misplaced. In *Hohn,* the *defendant* filed the petition for a writ of certiorari. Therefore, because a defendant is always a "party," *Hohn* does not help the funds establish that victims also have "party" status.

Accordingly, because victims do not have "party" status, they do not have a right to petition for certiorari under Section 1254.

C. The Funds' policy arguments do not justify a departure from the clear language of the CVRA or 28 U.S.C. § 1254(1).

It is axiomatic that apart from the original jurisdiction conferred by Article III of the Constitution (which plainly does not apply here), the Court's jurisdictional authority derives from statutes enacted by Congress. *See Felker v. Turpin*, 518 U.S. 651, 661

(1996).[3] In support of their petition for a writ of certiorari, the Funds rely, almost exclusively, on public policy justifications. The appropriate forum for the Funds' arguments, however, is Congress, not this Court. Regardless of the validity or invalidity of the Funds' policy arguments, the Court's jurisdiction to hear the Funds' appeal must have a statutory basis, which is absent here. Having failed to establish any statutory basis for the Court's jurisdiction, the Funds' petition for a writ of certiorari must be denied.

Further, equally strong policy arguments support denying alleged victims the right to seek certiorari review. First, allowing appeals by alleged victims would undermine the well-established interest in the finality of judgments. *See Daniels v. U.S.*, 532 U.S. 374, 378 (2001) (discussing the judiciary's general interest in the finality of criminal judgments).

Second, allowing appeals by alleged victims would disrupt the orderly administration of justice. As the Court of Appeals for the Tenth Circuit explained in *Hunter:*

> Finally, § 3771(d)(6) states that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." This

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[3] The Funds correctly state that the Court has jurisdiction to determine its own jurisdiction. Petition at 12, *citing United States v. Ruiz*, 536 U.S. 622, 628 (2002); however, it does not follow, and the Funds have not argued, that the Court's authority to *determine* its own jurisdiction carries with it a concomitant right to *create* jurisdiction over the Funds' petition for a writ of certiorari.

> provision evinces the impropriety of re-opening sentences - especially those resulting from plea agreements - once purported victims have asserted their rights in the district court and to the court of appeals in a mandamus petition . . .
>
> If individuals were allowed to re-open criminal sentences after all issues have been resolved - including any mandamus petitions by victims - then the government's prosecutorial discretion would be limited.

548 F.3d at 1316.

In sum, the CVRA gives victims a expressly limited, time-constrained remedy to seek review of a district court's adverse decision. Under these circumstances, there is no reason to upset the unambiguous statutory scheme simply to give victims one more bite at the apple, particularly where granting such a right would undermine the very reason for tightly constraining the review by the court of appeals - the strong interest in achieving finality in sentencing.

II. THERE IS NO SPLIT IN THE CIRCUITS THAT WARRANTS REVIEW BY THIS COURT.

The Court of Appeals correctly determined that on the facts of this case, the Funds are not victims entitled to restitution because they were not directly and proximately harmed by the lone conspiracy crime of conviction, but rather, were harmed, if at all, by a separate, uncharged conspiracy that involved materially different acts and elements. The Funds ground their petition for a writ of certiorari on a split in the circuits, which they characterize as being

whether restitution in conspiracy cases is limited to the harm caused by the offense of conviction, or extends more broadly to harm caused by closely "related" but uncharged conduct of the defendant; however, there is no such split. More importantly, the circuits courts unanimously agree that victim status for restitution purposes does not extend to one harmed by uncharged conduct that was not part of the conspiracy crime of conviction.[4]

A. *Hughey* and its aftermath.

In *Hughey v. United States*, 495 U.S. 411, 416 (1990), this Court held that the Victim and Witness

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[4] Doherty also submits that the Funds did not adequately preserve this issue for review. At both the district court and the court of appeals, the Funds strenuously argued that they were victims of Doherty's money laundering conspiracy because Doherty's payment of cash to U.S. Rebar's workers was the "financial transaction" that established the underlying money laundering crime. 568 F.3d at 84 - 84 (the Funds "reiterate[] arguments made below that Doherty's cash payments to his employees were the financial transactions that completed the money laundering conspiracy."). The lower courts, however, conclusively rejected the Funds' argument, finding instead that the check casher's delivery of the cash to Doherty was the "financial transaction" for purpose of the money laundering crime.

Here, the Funds do not argue that they were victims because Doherty's cash payments to U.S. Rebar's workers were the "financial transactions" for purposes of the money laundering crime. Instead, the Funds now argue that they should be considered victims simply because, in their view, there is some "relatedness" between the money laundering conspiracy crime of conviction and their loss of contributions. Doherty submits that the Funds' current argument materially differs from the argument it pressed below, and that the Funds' did not adequately preserve their current argument for review.

Protection Act ("VWPA") authorized restitution to compensate victims "only for losses caused by the conduct underlying the offense of conviction." Examining the statutory language of the VWPA, the Court determined that "Congress intended restitution to be tied to the loss caused by the offense of conviction," rather than "all conduct attributable to the defendant, including conduct unrelated to the offense of conviction." 495 U.S. at 418.

In response, Congress amended the VWPA to expand the definition of "victim" to include "a person directly and proximately harmed as a result of the commission of an offense ... including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern." *See* 18 U.S.C. § 3663(a)(2); *United States v. Bussell,* 504 F.3d 956, 966 (9th Cir. 2007). Therefore, under the amended definition, "if someone is convicted of a conspiracy, the court can order restitution for damage resulting from any conduct that was part of the conspiracy and not just from specific conduct that met the overt act requirement of the conspiracy conviction." *Id.* Nonetheless, the amended definition of "victim" still requires one to be harmed by criminal "conduct that is both engaged in the furtherance of the scheme, conspiracy or pattern, and proscribed by the criminal statute the defendant was convicted of violating," and "does not include a person who has experienced no harm arising from the criminal conduct that gives rise to the offense of conviction." *United States v. Kones*, 77 F.3d 66, 70 - 71 (3d Cir. 1996).

Congress used an identical definition of "victim" when it enacted the MVRA. *See* 18 U.S.C. § 3663A(a)(2). Therefore, under the MVRA, *Hughey* still "requires the court to exclude injuries caused by offenses that are not part of the scheme of which [the defendant] has been convicted." *United States v. George*, 403 F.3d 470, 474 (7th Cir. 2005). *See also United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004) ("[E]ven after the CCA and the MVRA, a criminal defendant cannot be compelled to pay restitution for conduct committed outside of the scheme, conspiracy, or pattern of criminal behavior underlying the offense of conviction."). Indeed, that is precisely why the Court of Appeals ruled that the Funds were not victims in this case.

B. There is no split in the circuits concerning the definition of "victim" under the MVRA in conspiracy cases.

The Funds describe the so-called split among the circuit courts as being between the courts that extend victim status to those harmed by "closely related, uncharged conduct," and the courts that limit victim status to those harmed by conduct that is one of the elements of the offense of conviction. While some courts have characterized victim status more broadly than others, no court has held (or even suggested) that victim status extends to persons, such as the Funds, who were harmed by criminal conduct that was separate and distinct from the crime of conviction. Accordingly, there is no split among the circuits on the facts presented by this case.

Several circuits have held that in conspiracy cases, victims can include persons who were directly and

proximately harmed by the criminal conspiracy of which the defendant was convicted, even if (1) the victims were not named in the information or plea agreement, or (2) the operative events occurred outside of the statute of limitations. *See. e.g., United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007); *United States v. Holthaus*, 486 F.3d 451 (8th Cir. 2007); *United States v. Dickerson*, 370 F.3d at 1342; *United States v. Hensely*, 91 F.3d 274, 277 (1st Cir. 1996); *United States v. Henoud*, 81 F.3d 484 (4th Cir. 1996). Significantly, however, this case presents vastly different facts because the lower courts determined that the Funds were not harmed by the conspiracy crime of conviction, which was completed when Doherty received the cash from the check casher, but instead, were harmed by a separate and distinct uncharged conspiracy that involved materially different acts and elements.

Indeed, the Court of Appeals expressly raised and dismissed the very argument the Funds now assert regarding a possible split in the circuits regarding those harmed *by a separate criminal scheme that was outside the counts of conviction*. The Court of Appeals reasoned in this regard as follows:

> A decision of the Ninth Circuit could be interpreted to contradict our position, as it states that the amendment to the VWPA overrules the holding in *Hughey* and allows restitution to be granted to those "harmed in the course of the defendant's scheme even beyond the counts of conviction." *United States v. Brock-Davis*, 504 F.3d 991, 999-1000 (9th Cir. 2007) (emphasis in original) (quoting *United States v. Rutgard*, 116 F.3d 1270, 1294 (9th Cir.

> 1997)). In reaching that conclusion, the Ninth Circuit determined that conduct not specifically mentioned in an indictment charging a conspiracy to manufacture methamphetamine on a specific date and at a specific location, was, in fact, "related conduct" for which restitution could be granted. *Id.* at 999. The Ninth Circuit ordered restitution for damages to a motel caused by the conspirators' manufacturing of methamphetamine that occurred on a different date and in a different city than that alleged in the indictment. *Id. The case, however, can be read to correspond with the instant decision because the Ninth Circuit, in effect, found that the conduct for which restitution was granted, which was identical to the charged conduct, was a part of the "pattern of criminal activity" that formed the basis of the conspiracy to manufacture methamphetamine. A comparable situation in the case before us would arise if the indictment had specified specific forged checks and a victim suffering a loss as a result of a non-identified forged check that had also been laundered had moved for restitution. That is not this case, however, as Local 46 is asserting different victim status based on Doherty's acts of payment to his employees, acts that are different from, and outside of, the charged activities.* (Emphasis added.)

568 F.3d at 87, n. 3

Moreover, the Funds mischaracterize the decisions they rely upon in their zeal to identify a split among the circuit courts. For example, the Funds cite the Eighth Circuit's decision in *Holthaus* for an expansive

definition of "victim" under the MVRA; however, the Funds rely on *dicta* in that case that falls well short of establishing a spit in the circuits.

In *Holthaus*, the Court of Appeals for the Eighth Circuit affirmed an award of restitution in favor of a bankruptcy trustee who the district court had found was directly and proximately harmed by the offense to which the defendant had pleaded guilty – the filing of a false declaration in connection with an individual's bankruptcy petition. In *dicta* in a footnote, the *Holthaus* Court acknowledged that the victim of a conspiracy or scheme crime need not be specifically named in the indictment or guilt plea to recover restitution. Thus, *Holthaus* stands for the unremarkable proposition that one harmed by the scheme or conspiracy of conviction can be a victim entitled to restitution, even if that person was not named in the indictment or guilty plea. Significantly, however, *Holthaus* does not depart from the well-settled rule that to be a victim, one must be directly and proximately harmed by the conspiracy of conviction.

Indeed, this point is evidenced by the fact that *Holthaus* did not address, or purport to change, the Eighth Circuit's earlier decision in *United States v. Ramirez*, 196 F.3d 895, 900 (8th Cir. 1999), which held that the scope of the scheme or conspiracy of conviction defines the outer limits of permissible restitution. In *Ramirez*, the court stated in pertinent part as follows:

> Under the statute as amended, the district court had discretion to order restitution for all the victims of Ramierz's scheme to defraud, whether or not their transactions were

specifically named in the indictment. However, we still need to determine the contours of that scheme. In explaining a later amendment that made restitution mandatory for certain offenses, the Senate Judiciary Committee stated:

> The committee intends this provision to mean, except where a conviction is obtained by a plea bargain, that mandatory restitution provisions apply only in those instances where a named, identifiable victim suffers a physical or pecuniary loss *directly and proximately caused by the course of conduct under the count or counts for which the offender is convicted.*

[Citation omitted.] Consistent with both the plain language of the statue and this indication of legislative intent, we "look to the scope of the indictment" to determine whether an award is "within the outer limits of a permissible restitution order." ....

In this case, the indictment was limited to the Wilmar Project fraud and did not state, or even imply, that this fraud was part of a broader, ongoing scheme of any kind, much less one dating back to the mid-1970s. *Ramirez was not charged with nor convicted of defrauding investors in other projects and the fact that the government has allowed other investors to file claims against his forfeited assets in no way expands the universe of persons who may be awarded restitution under 18 U.S.C. § 3663(a). We conclude that restitution in this case must be*

limited to those victims who lost money investing in the Wilmar Project. (Emphasis added.)

196 F.3d at 899 -900.

The Funds also mistakenly rely on the First Circuit's decision in *Hensely*. The Funds cite *Hensely* for the proposition that restitution is available to a victim, even if the criminal conduct that harmed the victim was not alleged in a count to which the defendant pleaded guilty, or was not even charged in an indictment. When the court's statements are viewed in context, however, it is apparent that the court's decision is consistent with the Second Circuit's ruling in this case.

In *Hensely*, the defendant pleaded guilty to an indictment alleging that he devised and executed a scheme in Boston to obtain merchandise by false pretenses from specific computer-products distributors during a specified period of time. After the defendant's guilty plea and before sentencing, the government learned that the defendant had committed additional, virtually identical additional fraudulent acts during the same time period. The court permitted a victim of the subsequently-discovered fraud to recover restitution because, in the court's view, the victim was directly and proximately harmed by the very scheme for which the defendant was convicted. Significantly, however, the court denied restitution to persons harmed by the defendant's other criminal acts - use of counterfeit money to pay certain bills - "because they were not part of the scheme underlying the offense of conviction." 91 F.3d at 278, n. 3. Thus, *Hensley* supports only the unremarkable proposition that subsequently identified victims who were harmed by

the scheme of conviction can recover restitution even though they were not named in the indictment.

The Funds also mistakenly rely on the Fourth Circuit's decision in *Henoud*. In *Henoud*, the defendant was convicted of an overseas call-selling scheme and was ordered to pay restitution to the local and long-distance telephone companies he defrauded during the course of his conspiracy. The defendant challenged the district court's order of restitution, contending that it improperly required him to pay certain companies not specifically named in the indictment.

In affirming the trial court's order, the court of appeals held that restitution was proper, notwithstanding the fact that certain victims were not named in the indictment, because they were directly harmed by the acts of fraud that comprised the scheme for which the defendant was convicted. As the court explained:

> The acts comprising the scheme to defraud therefore constitute the conduct underlying the offense of conviction and establish "the outer limits of [the] restitution order." [Citation omitted.] And the district court's inclusion of any loss to any victim caused by the scheme to defraud would satisfy *Hugley's* requirement of focusing only upon the specific conduct underlying the offense of conviction." Because the indictment alleges with specificity a scheme to defraud local and long-distance carriers, "[t]he district court had the authority to order restitution for the losses by the entire fraud scheme, not merely for the losses caused by the

> specified acts of fraud proved by the government at trial." [Citation omitted.]
>
> ... *As long distance carriers, Metro Media and Allnet were directly harmed by Henoud's criminal activity and thus properly included in the restitution order as victims of the offenses. Henoud places too much emphasis on the fact that these long-distance carriers are not specifically named in the indictment. The indictment's description of Henoud's criminal scheme and intended targets is sufficiently broad to include the smaller carriers also injured.* (Emphasis added.)

81 F.3d at 489. Consequently, *Henoud* is consistent with the Second Circuit's decision in this case, in that it requires a victim to have been directly and proximately harmed by the conspiracy of conviction.

The Funds also mistakenly rely on the Eleventh Circuit's decision in *Dickerson*. In *Dickerson*, the court held that "where a defendant is convicted of a crime of which a scheme is an element, the district court must, under 18 U.S.C. § 3663A, order the defendant to pay restitution to all victims for the losses they suffered from the defendant's conduct in the course of the scheme, even where such losses were caused by conduct outside the statute of limitations." 370 F.3d at 1342. Therefore, contrary to the Funds' argument, *Dickerson* does not support the proposition that those harmed by a separate, uncharged scheme, are entitled to restitution.

Finally, the Funds mistakenly rely on the Ninth Circuit's decision in *Brock-Davis, supra*. As explained

above, the Second Circuit correctly determined that *Brock-Davis* was consistent with its decision in this case. 568 F.3d at 87, n. 3.

In short, far from there being a block of circuit courts that squarely advocate an expansive interpretation of the definition of "victim" in conspiracy cases that could possibly encompass the Funds, the circuit courts unanimously hold that to be a victim, one must be directly and proximately harmed by the conspiracy or scheme of conviction. Thus, because the Funds were harmed, if at all, by uncharged crimes that were separate and distinct from the money laundering conspiracy crime of conviction, the Court of Appeals for the Second Circuit correctly held that the Funds are not victims entitled to restitution, and there is no split among the circuits on this point.

C. The Funds seek to unreasonably expand the definition of the term "victim."

In essence, the Funds argue that the term "victim" should include anyone harmed by uncharged criminal conduct so long as the conduct was temporally related to the conspiracy crime of conviction. Petition at 17 - 18. Citing Section 3663A(a)(2) of the MVRA, which provides that to be a victim, one must be "directly and proximately harmed as a result of the commission of an offense ... including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendants' criminal conduct in the course of the scheme, conspiracy, or pattern," the Funds reason that Congress intended to include acts

beyond the scheme or conspiracy of conviction. The Funds are mistaken.

First, as the Second Circuit recognized in this case, the Funds' interpretation renders the "directly and proximately harmed as a result of the commission of an offense" language superfluous. 568 F.3d at 87.

Second, as explained above, several courts have recognized that the "in the course of the scheme, conspiracy, or pattern" language reasonably can be interpreted as expanding the scope of victims to include those harmed by the scheme or conspiracy of conviction, even if they were not named in the indictment or plea agreement, or their harm occurred outside of the statute of limitations; however, each of those courts also recognized that the language cannot reasonably be used to provide restitution to those who were directly and proximately harmed by a different, uncharged scheme or conspiracy, even if the harm occurred at or near the same time.

Third, this is not an appropriate case in which to consider expanding the definition of the term "victim" in the MVRA. The lower courts in this case unanimously found that the crime of conviction (conspiracy to commit money laundering) was completed when Doherty received the cash from the check casher for the fraudulent checks Doherty issued, and the Funds were harmed, if at all, by a separate, uncharged conspiracy involving materially different acts and elements - Doherty's use of the cash he received from the check casher to pay employees off the books, and Doherty's corresponding fraudulent failure to have U.S. Rebar report the hours or pay contributions to the Funds for hours worked by those

employees. Because no court has held or even suggested that victim status should be extended to encompass persons harmed by crimes that were not part of the conspiracy crime of conviction, and involved materially different acts and elements, the Court should not to use this case to consider the issue.

Fourth, it is noteworthy that multiemployer trust funds already have strong civil remedies through which they can recover delinquent contributions. Congress enacted Section 515 of the Employee Retirement Income Security Act, 29 U.S.C. § 1145, for the very purpose of easing a fund's ability to recover delinquent contributions. Moreover, trust funds also can recover delinquent contributions from individuals who constitute alter egos of a delinquent employer. *See, e.g. Trustees of the Nat'l Elevator Indus' Pension Health Benefit and Educ' Funds v. Lutyk*, 332 F.3d 188 (3d Cir. 2003). Accordingly, there is no need to expand the definition of the term "victim" to protect multiemployer trust funds.

In sum, there is no split in the circuits regarding the meaning of the term "victim" in the MVRA and the lower courts unanimously agree that victim status does not encompass one harmed by a defendant's criminal conduct that was separate and distinct from the crime of conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

—♦—

In re

LOCAL # 46 METALLIC LATHERS UNION AND REINFORCING IRON WORKERS AND ITS ASSOCIATED BENEFIT AND OTHER FUNDS,

Petitioners,

– against –

UNITED STATES OF AMERICA; CHARLES DOHERTY; HON. JOANNA SEYBERT, UNITED STATES DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK; HON. DENNIS JACOBS, CHESTER STRAUB, PETER HALL AND REMAINING JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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STATEMENT

Petitioners (collectively, the "Union") decline respondent Charles Doherty's premature invitation to extensively debate the facts or the merits of the questions presented. We write chiefly to reiterate the questions' cert-worthiness, which Doherty's 32-page opposition ("Opp.") confirms by sheer length alone.

REPLY ARGUMENT

I. THE COURT SHOULD HEAR THIS CASE TO DETERMINE ITS OWN JURISDICTION TO REVIEW CVRA MANDAMUS DENIALS IN THE COURTS OF APPEALS

The Union's first question presented asks whether this Court has "jurisdiction" to "review circuit court denials of [victim] mandamus petitions under the CVRA." Pet. i. Doherty does not dispute, and thereby tacitly concedes, the crux of the Union's argument on this point:

- This Court's authority to review CVRA mandamus denials is an open and unsettled question.

- With the advent of the CVRA and MVRA, victims and victim rights play increasingly prominent roles in federal criminal proceedings.

- This increased prominence makes the jurisdictional question exceptionally novel and important.

- The question will endlessly repeat yet evade review unless this Court steps in to resolve it, as the Court alone has jurisdiction to determine its own jurisdiction.

Rather than confront these stark institutional concerns – reason enough to hear this case – Doherty contests the Court's jurisdiction on the merits. That puts the cart before the proverbial horse and only underscores the need for this Court's intervention. Even so, Doherty's substantive argument fails on its own terms.

As this Court has long recognized, certiorari jurisdiction generally lies for "a 'party' to a case in the Court of Appeals," *Automobile Workers v. Scofield*, 382 U.S. 205, 208-09 (1965), and a "case" in this context means any "'proceeding in court,'" *Hohn v. U.S.*, 524 U.S. 236, 241 (1998). Since the mandamus petition was a "case" in the Court of Appeals to which the Union was a named "party," this Court's jurisdiction would seem assured. *Cf. In re Antrobus*, 563 F.3d 1092, 1097 (10th Cir. 2009) (assuming certiorari jurisdiction to review CVRA mandamus denials in circuit courts); *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (exercising certiorari jurisdiction to review mandamus grant).

Trying to avoid this straightforward conclusion, Doherty offers several unpersuasive responses.

First, he notes that the CVRA's "plain language" confers a "mandamus remedy with the circuit court," but no right to "further relief." Opp. 2, 10. Yet that merely restates the obvious and begs the question presented. *See id.* 11 ("The [Union] acknowledge[s] that the CVRA does not expressly grant alleged victims the right to seek review of a denial of a petition for ... mandamus") (citing Pet. 8). Doherty cannot defeat the Union's petition by resorting to undisputed truisms.

Nor does the statute's silence on this score divest the Court of jurisdiction by negative implication. *See* Opp. 9-14, 18. Nothing in the CVRA purports to override the background presumption favoring certiorari jurisdiction, and Congress knows how to do so when it wants to. *Cf.* 28 U.S.C. § 2244(b)(3)(E) ("The grant or denial of an authorization by a court of appeals to file a second or successive [habeas] application ... shall not be the subject of a petition ... for a writ of certiorari.").

Second, Doherty claims that certiorari review would frustrate the CVRA's "short" deadlines for filing and deciding mandamus petitions, delaying "finality in sentencing." Opp. i, 2, 9, 12-14 & n.2, 17-18. This argument is multiply flawed:

A. Contrary to Doherty's implicit assumption, a restitution hearing is not part of the sentencing

process at all, but "a summary proceeding ancillary to a criminal prosecution" that aids "tort victim[s]" in "recover[ing their] damages." *U.S. v. Bach*, 172 F.3d 520, 523 (7th Cir. 1999) (Posner, C.J.). And since restitution isn't part of sentencing, another level of judicial review cannot possibly affect sentencing finality in the circumstances at hand. *See U.S. v. George*, 403 F.3d 470, 473 (7th Cir. 2005) (restitution "not a criminal punishment" but a "civil remedy administered for convenience by courts that have entered criminal convictions") (Easterbrook, J.).

B. Consistent with restitution's non-criminal nature, the MVRA expressly contemplates bifurcation of restitution and sentencing proceedings. In particular, 18 U.S.C. § 3664(d)(5) allows judges to defer restitution determinations until "90 days after sentencing," and up to 150 days under certain conditions. And even those limits are "non-jurisdictional,"[1] as appellate courts routinely uphold restitution orders entered "months" and "years" after sentencing. *Dolan*, 571 F.3d at 1026 (roughly nine months); *accord U.S. v. Balentine*, 569 F.3d 801, 802 (8th Cir.) (over two years), *cert. pending*, No. 09-6760 (filed Sept. 28, 2009).

As this discussion demonstrates, the statutory scheme already anticipates the issuance of post-

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[1] *U.S. v. Dolan*, 571 F.3d 1022, 1030 (10th Cir. 2009), *cert. granted*, 2010 WL 46509 (Jan. 8, 2010); *accord U.S. v. Bogart*, 576 F.3d 565, 571 (6th Cir. 2009).

sentencing restitution awards. Moreover, even long delays in calculating restitution do not constrain judges from sentencing in the interim and imposing restitution much later. In these circumstances, any claim that certiorari review will somehow impair sentencing finality is fanciful. *Contra U.S. v. Zakhary*, 357 F.3d 186, 191 (2d Cir. 2004) (MVRA time limits *not* meant to "establish finality" or prevent "drawn-out sentencing proceedings"). This is especially true because another CVRA provision, 18 U.S.C. § 3771(d)(5), allows victim motions to reopen sentences in specified situations, further negating any expectation of finality. Indeed, this Court recently granted certiorari to address a closely related question – may district courts enter restitution orders beyond the MVRA's time limits? – making this case an ideal companion. *See Dolan v. U.S.*, No. 09-367, cert. pet. i (Sept. 23, 2009).

C. Most fundamentally, Doherty's position turns the law on its figurative head, as the MVRA's time restrictions are "designed to protect *victims*, *not* defendants," *U.S. v. Marks*, 530 F.3d 799, 812 (9th Cir. 2008), by thwarting asset "dissipation." *U.S. v. Dando*, 287 F.3d 1007, 1010 n.4 (10th Cir. 2002); *see Dolan*, 571 F.3d at 1029 ("need for speed and finality arises out of concern for *victims*, *not* victimizers"). Similar concerns motivate the complementary time frames in the CVRA. *See Antrobus*, 519 F.3d at 1129-30 (CVRA mandamus deadlines "afford litigants considerably more rights than they would otherwise have"); *Kenna v. U.S. Dist. Ct.*, 435 F.3d 1011, 1018 (9th Cir. 2006) (apologizing to victim for noncompliance with three-day decision rule);

18 U.S.C. § 3771(a)(7) (granting *victim* right to "proceedings free from unreasonable delay").

It would be anomalous if Doherty, a convicted money launderer, could evade certiorari in this case by invoking a series of victim-friendly time constraints. Such an undeserved "windfall" would "defeat the statutory purpose" and add insult to injury, twice rewarding the wrongdoer "at the expense of those already once" wronged. *Balentine*, 569 F.3d at 804, 807.

Third, Doherty seeks to consign unsuccessful mandamus petitioners to direct government appeals on their behalf in the underlying criminal prosecution. Opp. 1-2, 9, 11. Doherty's position is internally inconsistent. If victim certiorari petitions supposedly impair sentencing finality, then what of post-judgment appeals by the government? After all, they not only prolong the resolution of criminal litigation but threaten to unwind the whole sentencing package well after the fact. Doherty cannot have it both ways.

More elementally, though, Doherty's position proves too much. For it would leave victims aggrieved by circuit court mandamus denials solely to the government's good offices, which may or may not be exercised. And that, in turn, would subvert the CVRA's goals of victim empowerment and *expanded* appellate recourse – *viz.*, "direct standing" to "vindicate their

[own] rights *independent* of prosecutors." *U.S. v. Turner*, 367 F. Supp. 2d 319, 324, 336 (E.D.N.Y. 2005).[2]

Fourth, and finally, Doherty disputes the Union's status as a "party" within the meaning of 28 U.S.C. § 1254(1). Opp. i-ii, 14-16. This argument is purely semantical. Beyond the Union's undeniable "party" status in the Court of Appeals under *Scofield* – a case Doherty studiously ignores – this Court has traditionally construed the term in practical, common sense fashion.[3] And more pointedly, the CVRA itself strives to make victims "independent participants in the ... justice process," with their own "seat at the table." *Antrobus*, 563 F.3d at 1101. There is no principled distinction between a "party," on the one hand, and an "independent participant[]" with its own "seat at the table" on the other.

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[2] Doherty's heavy reliance on *U.S. v. Hunter*, 548 F.3d 1308 (10th Cir. 2008), is entirely misplaced. *See* Opp. 12-13, 15-18. There, twice rebuffed mandamus petitioners tried to bypass certiorari review – which the Tenth Circuit assumed available later in the same case, *see Antrobus*, 563 F.3d at 1097 – by pursuing a direct, post-judgment appeal of the defendant's sentence in the underlying criminal prosecution. Here, by contrast, the Union has proceeded exactly as the Tenth Circuit recommended, seeking a writ of certiorari from this Court following the Second Circuit's denial of mandamus relief.

[3] *See* Pet. 9 n.2; *Devlin v. Scardelletti*, 536 U.S. 1, 7-8, 10 (2002).

U.S. ex rel. Eisenstein v. N.Y.C., 129 S. Ct. 2230 (2009), cited at Opp. 14, embraces and extends this pragmatic approach, fully supporting the Union's position. The United States, having expressly declined to intervene, was merely a nominal party to the private qui tam action in that case, brought under the False Claims Act, 31 U.S.C. § 3729. Here, in contrast, the Union *did* functionally intervene in district court, vigorously litigating its right to restitution and an ensuing mandamus petition on its own behalf.

II. THE COURT SHOULD HEAR THIS CASE TO RESOLVE A CIRCUIT SPLIT AS TO WHETHER RESTITUTION IN CONSPIRACY CASES IS LIMITED TO HARM CAUSED BY THE OFFENSE OF CONVICTION, OR EXTENDS MORE BROADLY TO RELATED UNCHARGED CONDUCT BY THE DEFENDANT

The Union's second question presented asks whether the amended definition of "victim" in the VWPA (18 U.S.C. § 3663) and MVRA (*id.* § 3663A) abrogates *Hughey v. U.S.*, 495 U.S. 411 (1990), in conspiracy cases by extending restitution to "acts of related conduct for which the defendant was not convicted," as distinct from conduct forming an element of the offense of conviction. Pet. ii. Doherty concedes that the circuits disagree over how to construe the term "victim" in restitution cases involving conspiracies. Opp. 3, 21. But he tries to reduce the dispute to minor squabbles about whether putative victims must be

named in the charging instrument or plea agreement to qualify for restitution, and whether the "operative events" must occur within the "statute of limitations." *Id.* 3, 22, 30. Doherty's effort to downplay the conflict's magnitude is unavailing, reading the relevant cases too literally and narrowly.

U.S. v. Brock-Davis, 504 F.3d 991 (9th Cir. 2007), illustrates the point. The defendant there was accused and convicted of a discrete conspiracy to manufacture methamphetamine "on a specific date ... at a specific location,"[4] on Oct. 18, 2005 in Missoula, Montana. *Id.* at 994, 998. Yet the Ninth Circuit upheld a restitution order based on the defendant's role in an uncharged conspiracy to manufacture methamphetamine "on a different date ... in a different [place],"[5] Kalispell, Montana. *Id.* at 994-95, 998. The Court reasoned that the "expansive" victim definition in the amended VWPA and MVRA had "overrule[d]" *Hughey* in conspiracy cases, allowing restitution for "acts of related conduct" committed by the defendant "*even beyond the counts of conviction.*" *Id.* at 998-99.[6]

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[4] *In re Local #46*, 568 F.3d 81, 87 n.3 (2d Cir. 2009) (opinion below).

[5] *Ibid.*

[6] The Second Circuit's opinion below, quoted at Opp. 22-23, is written to minimize the appearance of conflict and cannot be harmonized with *Brock-Davis*. The Second Circuit deemed the decisions consistent to the extent that the uncharged Kalispell (continued...)

At least four other circuits concur in this conclusion. *See, e.g., U.S. v. Holthaus*, 486 F.3d 451, 458 n.6 (8th Cir. 2007) (amendments authorize restitution for "'every victim harmed in the course of the defendant's conspiracy ..., not just the offense of conviction'") (quoting *U.S. v. Scat, Inc.*, 40 Fed. Appx. 310, 311 (8th Cir. 2002))[7]; *U.S. v. Dickerson*, 370 F.3d 1330, 1334-36 & n.8, 1338-43 (11th Cir. 2004) (amendments require restitution "for all losses resulting" from "relevant conduct" or "common scheme"

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[6](...continued)
episode in *Brock-Davis* was part of the same "'pattern of criminal activity'" as the Missoula offense of conviction. 568 F.3d at 87 n.3. But Brock-Davis was charged with a methamphetamine *conspiracy, not* a methamphetamine *pattern*. And by its terms, MVRA § 3663(A)(2) authorizes restitution for harm inflicted in the course of "*the* scheme, conspiracy, or pattern," but *only* where the offense involves a scheme, conspiracy or pattern "as an *element*." Therefore, because Brock-Davis's methamphetamine conspiracy offense had *no* pattern "element" – and because the Kalispell episode was outside the scope of the narrow Missoula conspiracy charged in the indictment – the Ninth Circuit necessarily went beyond the elements of the offense of conviction in awarding restitution for the Kalispell episode. Yet the opinion below unequivocally rejected that approach, expressly limiting restitution to harm caused by the conspiracy element of the offense of conviction itself. It follows that the decisions are flatly contradictory, notwithstanding the Second Circuit's effort to reconcile them.

[7] Since *Holthaus* relied on an intervening Eighth Circuit decision, Doherty's observation (Opp. 24-26) that it "did not address, or purport to change," an "earlier" ruling from the same Court, *U.S. v. Ramirez*, 196 F.3d 895 (8th Cir. 1999), is inscrutable.

closely "related" to charged conspiracy)[8]; *U.S. v. Hensley*, 91 F.3d 274, 277 (1st Cir. 1996) (amendments allow restitution in conspiracy cases whether or not defendant's harmful conduct is "charged in the indictment"); *U.S. v. Henoud*, 81 F.3d 484, 488 (4th Cir. 1996) (amendments extend restitutionary authority to conduct "closely related" to charged conspiracy, whether or not defendant "convicted for each criminal act" within its scope).[9]

In contrast, at least four other courts of appeals – including the Second Circuit in this case – take the opposite view, asserting that *Hughey* continues to "'exclude injuries caused by offenses that are not part of the conspiracy of which the defendant has been convicted.'" *U.S. v. Elson*, 577 F.3d 713, 723 (6th Cir. 2009) (quoting *George*, 403 F.3d at 474); *accord Local # 46*, 568 F.3d at 87 (touchstone "remains the 'offense' of which the defendant has been convicted.... [The

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[8] Doherty mischaracterizes *Dickerson* as holding that even under the amended VWPA and MVRA, defendants "cannot be compelled to pay restitution for conduct committed outside ... the ... conspiracy ... underlying the offense of conviction." Opp. 21. But he neglects to mention that this was merely an attempt to place a limiting gloss on *U.S. v. Hughey*, 147 F.3d 423 (5th Cir. 1998) ("*Hughey II*") and *U.S. v. Akande*, 200 F.3d 136 (3d Cir. 1999), cases on the opposite side of the circuit split.

[9] Admittedly, *Hensley* and *Henoud* also contain contrary language. *See* Opp. 26-28. But this intra-circuit – indeed, intra-*case* – confusion only punctuates the need for this Court to step in and clarify the law.

'conspiracy'] must be an 'element' of that 'offense' ... for ... conduct in the course of the ... conspiracy" to sustain a restitution award); *Akande*, 200 F.3d at 141 ("triggering event" and "boundaries of [] restitution[]" remain the "offense of conviction"); *Hughey II*, 147 F.3d at 437-38 (*Hughey* still restricts restitution to limits of conduct supporting offense of conviction). A starker and riper conflict is hard to imagine.

In contending otherwise, Doherty mischaracterizes his scheme to defraud the Union of required benefit contributions as "separate and distinct" from his money laundering conspiracy offense of conviction. Opp. 3, 7, 21-22, 29, 31. That is a fiction. In fact, as Doherty himself concedes (*id.* 3-4), he admitted in his sworn allocution that filching the Union was a primary object of the conspiracy to which he pleaded guilty: "[T]his was done by me [the check cashing money laundering scheme] for purposes of paying certain employees in cash" to avoid "union membership and other benefit[contributions] which the amount of their earnings would [otherwise] require," Pet. App. 123a, 126a. *See U.S. v. MacPherson*, 2009 WL 5125488, at *7 (2d Cir. Dec. 30, 2009) (Newman, J., concurring) ("A plea colloquy can be examined to determine a defendant's understanding of a plea agreement.").

To the extent the lower courts disagreed (Opp. i, 2, 7, 18, 22, 30),[10] they relied on the fallacy that restitution is limited to harm from conduct comprising the conspiracy element of the offense of conviction, as opposed to related, uncharged acts by the defendant in the course of the conspiracy. Doherty's contrary claim merely perpetuates that fallacy in this Court. But again, he cannot defeat the Union's petition by begging the question presented.

At bottom, Doherty's position raises a predominately factual dispute: was the conduct at issue closely related to, or separate and distinct from, the money laundering conspiracy for which he was charged and convicted? And in the first instance, that dispute is properly resolved by the lower courts on remand, under the appropriate legal standard as this Court determines it.[11]

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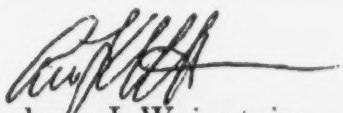
[10] *But see Local # 46*, 568 F.3d at 86 (Union "admittedly" harmed by common "plan" involving charged money laundering conspiracy).

[11] Contrary to Doherty's half-hearted suggestion (Opp. 19 n.4), the Union's second question presented is fully preserved for this Court's review. While the Union did urge below that it was a "victim[] of Doherty's [charged] money laundering conspiracy" (Opp. 19 n.4), it pointed the lower courts to MVRA § 3663(A)(2)'s broader "victim" definition in conspiracy cases – the correct legal standard – and the Second Circuit addressed the issue in depth. *See* 568 F.3d 85-88. Regardless, as the statute's name implies, a properly calculated restitution award under the MVRA is mandatory and unwaivable as a matter of law, whatever (continued...)

CONCLUSION

Certiorari should be granted.

Respectfully submitted,



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[11](...continued)
arguments the parties might make – indeed, "even if the[] victims decline" restitution altogether. *U.S. v. Johnson*, 378 F.3d 230, 244 (2d Cir. 2004); *see also* Pet. App. 43a ("The Court cannot ignore the requirements of the [MVRA] just because a party has not raised them.").

On the Petition:

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